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November 7, 2002

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**By Hand Delivery**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Room TWB-204  
Washington, DC 20554

ORIGINAL

Re: Application by Qwest Communications International, Inc., for Authorization to Provide In-Region InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming, Docket No. 02-314.

Dear **Ms.** Dortch:

On behalf of AT&T Corp. ("AT&T"), we are writing to address arguments raised by Qwest Communications International, Inc. ("Qwest") in its supplemental reply comments filed on October 25, 2002 (the "Qwest Reply") with respect to Qwest's extensive pattern of entering into secret, unfiled interconnection agreements. As AT&T has maintained from the outset, until the state commissions have completed a thorough investigation of this discriminatory practice and ensured that Qwest has publicly disclosed all of its interconnection agreements, mitigated the discriminatory effects of its entry into the secret arrangements, and disavowed its current impermissible narrow interpretations of the definition of interconnection agreement, the FCC simply cannot find that Qwest complies with Section 271's checklist items incorporating nondiscrimination requirements. Not surprisingly, even since the filing of reply comments in this proceeding, additional support for rejecting Qwest's Section 271 application pending such investigations and findings has arrived in the form of recent releases from the Minnesota Public Utilities Commission ("PUC") and the Staff of the Colorado PUC. As the attached analysis of Qwest's analysis makes clear, Qwest has not come close to correcting its discriminatory practices and their effect, and the investigations undertaken to date are either insufficient to support a grant of Section 271 authority or only support the rejection of Qwest's contention that it complies with the requirements of the Section 271 checklist.

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### Introduction and Summary.

In its Reply, Qwest once again seeks to categorize its entry into dozens upon dozens of secret interconnection arrangements as a “trifle” whose time has come and gone.’ As part of its standard effort to delay, defer and deflect appropriate scrutiny of its discriminatory practices, Qwest seeks to direct Commission consideration of this practice to a subsequent post-grant enforcement proceeding. Of course, in a moment of misdirected rhetoric, even Qwest itself recognizes that any “enforcement actions regarding Qwest’s past actions will *not* make the local exchange market in those states any more or less open to competition.”<sup>2</sup> Small wonder that, when in the Minnesota proceeding a Qwest witness made clear in a “flip” and “sarcastic” manner that Qwest could “afford 50 million bucks like nothing,” Qwest is willing to defer to a later date the possibility of facing an enforcement proceeding that will serve as absolutely no disincentive to avoid discriminatory action.

Indeed, rather than display any soul-searching regarding the very recent fervent findings in the Minnesota proceeding affirming the contemptible level of Qwest’s unlawful discriminatory action, Qwest spends several pages objecting to every possible procedural error in that proceeding and disavowing the factual conclusions now affirmed by the full Minnesota Commission.’ Qwest makes only the weakest, unsupported claim that it “has taken remedial action,” a claim that the Chairman of the Minnesota Public Utilities Commission (“PUC”) very recently refused to credit.<sup>5</sup> Qwest’s utter disregard for the regulatory process has been repeatedly demonstrated in the Minnesota complaint proceeding, and as Chairman Scott of the Minnesota PUC expressed most succinctly during the PUC’s full Commission hearing in that proceeding less than three weeks ago:<sup>6</sup>

Somebody’s eyes need to be open. . . . We’ve given Qwest time to show that they would be different. They are different. They’re worse. They’re better at it because they’re smarter, but they’re worse. . . . And so for [Qwest] to sit there today and tell me about these remedial measures you’ve taken, I have to tell you it rings kind of hollow . . . .<sup>7</sup>

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<sup>1</sup> See Qwest Reply at 57.

<sup>2</sup> *Id.* at 57, 62-63.

<sup>3</sup> Transcript of Meeting of the Minnesota PUC, Docket No. P-421/C-020197, October 21, 2002 (the “Minnesota Transcript”), Attachment 1 hereto, at 110 (Chairman Scott, who viewed the testimony states “Her testimony **was** flip, **sarcastic**, evasive. And her testimony about being able to afford 50 million bucks **like** nothing **was** just that **flip** and just that **sarcastic**.”)

<sup>4</sup> *Id.* at 62-64.

<sup>5</sup> *Id.* at 64; see Minnesota Transcript at 39.

<sup>6</sup> Minnesota Transcript at 39.

<sup>7</sup> *Id.* at 39; see also *id.* at 41 (“So, you know, there’s a big credibility issue here with you **folks**”).

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Qwest's substantive responses to the serious issues raised by its discriminatory practices have grown as lackadaisical as its attitude towards *its* discrimination. By this letter, AT&T refutes the oft-repeated tunes sung by Qwest, one by one.' While Qwest maintains its assertion that every written interconnection agreement has been filed, careful review confirms that unfilled interconnection agreements are still out there. And while Qwest also starkly denies the existence of oral secret agreements, their presence has been confirmed in at least two separate state proceedings in Arizona and Minnesota – the only proceedings where investigation has sought to discover and verify their existence. Moreover, at the same time that Qwest makes the rote assertions that it has filed every currently existing interconnection agreement, Qwest repeatedly attempts to extend the scope of every potential loop-hole it can craft from the Commission's order addressing Qwest's declaratory ruling request beyond the lawful bounds of Section 251 and 252. Qwest simply cannot be permitted to mutter repeatedly the words "settlement of historical dispute," "backward looking consideration" or "agreement not in effect" and escape the clear mandate of the Act and the Commission's declaratory ruling. Finally, despite its protestations to the contrary and the bare urgings of commissions tired of the long Section 271 process, Qwest cannot justify a grant of Section 271 authority prior to resolution of the issues generated by its discriminatory conduct in entering secret deals. As the Staff of the Colorado PUC recognized only a few days ago, some of these "secret agreements demonstrate the creation and sale of elements to certain parties but not others, which appears to be discriminatory, anti-competitive, violative of the letter and spirit of the Act, and arguably contrary to Section 271 approval."<sup>9</sup>

#### **I. Qwest Has Not Made Available All Of Its Interconnection Agreements.**

In its Reply, Qwest yet once more asserts that its unfilled agreements amount to nothing more than a "trifle," that it has filed all currently effective interconnection agreements, and has been filing all such agreements since the Spring of this year." Indeed, Qwest asserts that the terms of all of these agreements currently are available on its website and that the states will complete the process of reviewing, and presumably approving, these agreements by November 20, 2002." Qwest has repeatedly reiterated that it has taken steps to ensure that all

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<sup>8</sup> AT&T's response is supported by the attached Reply Declaration and Responsive Matrix of Kenneth L. Wilson, Attachment 2 hereto. AT&T also addresses Qwest's assertions by calling the Commission's attention to two newly-released pronouncements from the states: (1) the Transcript of the Minnesota PUC's meeting at which the PUC affirmed the findings of its administrative law judge, Minnesota Transcript, *supra* n.4, at 114 and (2) the Comments of the Staff of the Colorado PUC recommending that the Colorado PUC reject eleven of Qwest's late-filed interconnection agreements to avoid "an explicit endorsement of potential improprieties, the full extent of which remains unknown." and order the agreements be considered further in an open investigatory docket. Staff's Phase II Reply Comments, Colorado PUC Docket Nos. 96A-287T, 97T-507, 98T-042, 98T-519, 99T-040, 99T-067, 99T-598, 00T-064, 00T-277, 01T-013, and 01T-019, submitted November 5, 2002 ("Colorado Staff Comments"), Attachment 3 hereto, at 2, 7.

<sup>9</sup> Colorado Staff Comments at 6.

<sup>10</sup> Qwest Reply at 59.

<sup>11</sup> *Id.* at 60.

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agreements are filed with the state commissions, and that all agreements required to be filed pursuant to Section 252 that have not been terminated by Qwest are made available on its website. The Commission might recall that such commitments were made well before the findings by the Minnesota PUC concerning Qwest's oral secret arrangements.

Qwest's secret deals amount to significantly more than a "trifle." As the attached Reply Declaration of Kenneth L. Wilson demonstrates, the "trifle" consists of at least 31 as-of-yet unavailable agreements that contain discriminatory terms, 15 now-publicly-disclosed agreements that contained secret discriminatory terms for some significant period of time, and more than 20 additional agreements that have not been made public in violation of Section 252 regardless of the nature of their terms.<sup>12</sup> As reflected in the responsive matrix of Kenneth L. Wilson accompanying his Reply Declaration, numerous agreements remain secret, including at least five currently existing discriminatory agreements that Qwest refuses to acknowledge are interconnection agreements. Of these agreements, the Arizona Corporation Commission ("ACC") Staff already has concluded that several *are* interconnection agreements that must be filed.<sup>13</sup> Simply put, Qwest's claim that it has taken steps since the Spring of this year to ensure that all interconnection agreements that must be filed have been filed and placed on its website rings *exceptionally* hollow. The claim was not true this Spring, and after five months, the claim is still not true today.

On the same note, directly in the face of the findings made in the Minnesota and Arizona proceedings, Qwest also makes the flat assertion that it does not have a practice of engaging in oral interconnection agreements.<sup>14</sup> Qwest's claim to have eliminated any practice of entering secret deals, however, cannot be credited given the specific findings by the Minnesota PUC and the ACC Staff that Qwest knowingly and intentionally structured oral (and written) agreements to prevent their filing as required pursuant to Section 252. The well-supported findings and conclusions of the administrative law judge ("ALJ") in the Minnesota proceeding, now upheld by the PUC, undercut any claim that Qwest has eliminated its discriminatory practices through policies and practices adopted in the Spring of this year.

Qwest's attempt to deny and downplay the significance of the mounting evidence that it has entered into secret, discriminatory *oral* interconnection agreements with favored CLECs thus is unavailing. Amazingly, Qwest continues to deny the existence of its oral discount agreement with McLeod,<sup>15</sup> despite the unequivocal finding of the Minnesota ALJ adopted by the PUC based on specific evidence, including the testimony of at least two McLeod witnesses that

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<sup>12</sup> See Responsive Matrix of Kenneth L. Wilson.

<sup>13</sup> Wilson Reply Declaration, ¶ 11 (referencing six agreements in responsive matrix).

<sup>14</sup> Compare AT&T Comments at 15 with Qwest Reply at 62. In a footnote, Qwest quietly indicates that whatever oral agreements it had with McLeodUSA were terminated by an agreement dated September 20, 2002. See Qwest Reply at 62 n.68.

<sup>15</sup> See Qwest Reply at 61 n.68 ("it is Qwest's position that no such oral amendment was allowed **by** the written agreement or otherwise made").

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the ALJ found “credible,” “documentary evidence” -- including internal Qwest e-mails -- and “the course of conduct engaged in by the parties.” “The ALJ also made specific findings that the testimony of Qwest’s witness that no such oral agreement existed was “not credible.”” Qwest also continues to ignore the findings of the Staff of the ACC that Qwest entered into *multiple* oral agreements with CLECs.<sup>18</sup> In light of the specific findings of the Minnesota PUC and the ACC Staff that Qwest entered into several secret oral interconnection agreements with CLECs, Qwest’s attempt to minimize the issue by characterizing the existence of oral agreements as “greatly disputed” does not “ring” at all.” The existence of unlawful discriminatory oral agreements is firmly supported, and neither Qwest nor the Commission can simply deny or ignore them.<sup>20</sup>

Moreover, Qwest’s assertion that it has terminated the written contract with McLeod associated with the oral agreement does nothing to resolve the matter.” Without knowing the terms upon which the contract was terminated -- which Qwest does not reveal -- the Commission cannot know whether Qwest has simply discriminated again by buying out this agreement with a lump sum or some other arrangement that effectively gives McLeod the benefit of its discount scheme going forward, to the detriment of other CLECs. In this regard, Mr. Wilson suggests that with respect to several of the agreements that Qwest represents have been terminated, there appear to be separate undisclosed oral terms that go along with the terminated provisions.<sup>22</sup> Accordingly, the Commission cannot conclude that Qwest is no longer using the agreements or their successors as a vehicle for discrimination. As the Staff of the Colorado PUC has indicated, “[m]odification and amendments to [interconnection agreements], including discontinuation, are subject to the same approval process.”<sup>23</sup>

Qwest’s apparent recent termination of the unfiled agreement with McLeod is consistent with its pattern of terminating other unfiled agreements that have come under scrutiny.

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<sup>16</sup> *Findings of Fact, Conclusions, Recommendation and Memorandum*, In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements, Minnesota Public Utilities Commission, Docket No. P-421/C-02-197, at 43-47 (Sept. 20, 2002) (“Minnesota ALJ Decision”) (Attachment 1 to AT&T Qwest III Comments).

<sup>17</sup> *Id.* at 46.

<sup>18</sup> *Supplemental Staff Report And Recommendation In The Matter Of Qwest Corporation’s Compliance With Section 252(e) Of The Telecommunications Act of 1996*, Docket No. RT-00000F-02-0271, at 5 (Aug. 14, 2002) (“Arizona Supplemental Report”) (Attachment 1 to AT&T’s Qwest II Reply Comments) (“two carriers had oral agreements with Qwest, Eschelon and McLeod. . . . In the case of McLeod, there was an oral agreement concerning additional product amounts to be purchased by Qwest under a written purchase agreement.”); *see also id.* at 7 (“Qwest had both written and/or oral agreements with XO, Z-Tel (for 60 days only), Eschelon and McLeod wherein these CLECs agreed not to oppose Qwest’s 271 application or participate in 271 proceedings”).

<sup>19</sup> Qwest Reply at 61 n.68.

<sup>20</sup> *Id.* at 61 (asserting that “it is not Qwest’s business policy or practice to address such interconnection matters other than through written contracts, and that Qwest is not aware of any oral agreements that are in effect today” that are subject to the filing requirement).

<sup>21</sup> *Id.*

<sup>22</sup> Wilson Reply Declaration, ¶ 12.

<sup>23</sup> *See* Colorado Staff Comments at 3

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Termination of the agreements, however, does not eliminate their discriminatory effect. In many cases, these agreements were in effect for months or even years. Had they been filed as required by Section 252(a)(1), they would have been subject to the pick-and-choose obligations of Section 252(i), and AT&T and other carriers would have been able to obtain the favorable terms and conditions that the secret deal CLECs have enjoyed during all of this time. Indeed, AT&T and other carriers would have those terms and advantages today.

Thus, terminating the agreements on a going-forward basis hardly eliminates the effects of the competitive advantage that the favored CLECs enjoyed for substantial periods of time and, therefore, hardly eliminates the effects of the discrimination that AT&T and other CLECs have suffered. As Mr. Wilson demonstrates in his Reply Declaration, Qwest claims to have terminated numerous unfilled interconnection agreements, but has not made a sufficient effort to show that the agreements and terms that replaced these arrangements have been made available to CLECs.<sup>24</sup> Qwest therefore has in no way mitigated the damage to CLECs who could have opted into the terms that were provided to their competitors for months and even years, but now, once discovered, purportedly have been made unavailable by Qwest. Instead, Qwest has displayed substantial hostility to the “pick-and-choose” provision set forth in Section 252(i), one of “the most far reaching provisions”<sup>25</sup> of the Act.”

## II. Qwest Is Making Every Effort To Perpetuate It Discrimination

At the same time it makes the rote assertions that it has filed every interconnection agreement and does not enter oral agreements, Qwest repeatedly attempts to extend the scope of every potential loop-hole it can craft from the Commission’s order addressing Qwest’s declaratory ruling request.<sup>27</sup> A careful review of the Qwest Reply demonstrates that it has made a much stronger effort to refine its discriminatory approach with new justifications based on the FCC’s *Declaratory Ruling*. For example, as discussed by Mr. Wilson, Qwest has made every effort to interpret broadly, among other things, the Commission’s conclusion that “settlement agreements that simply provide” for “backward-looking consideration,” that is, “settlement contracts that do not affect an incumbent LEC’s ongoing obligations relating to section 251 need not be filed.”<sup>28</sup> Qwest appears to be adopting a very narrow interpretation of the Commission’s guideline for filing settlements by characterizing all of its agreements as “backward-looking.” As Mr. Wilson observes, the very nature and terms of

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<sup>24</sup> Wilson Reply Declaration and Responsive Matrix, ¶¶ 12-13.

<sup>25</sup> Colorado Staff Report at 3

<sup>26</sup> See Minnesota Transcript at 22-25 (Commissioners recognizing discriminatory nature of secret agreements absent ability to pick and choose).

<sup>27</sup> Memorandum Opinion and Order, *In the Matter of Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, WC Docket No. 02-89 (Oct. 4, 2002) (“Declaratory Ruling”).

<sup>28</sup> See *id.* at 58-59, Declaration of Larry B. Brotherson, Response To Matrix of Kenneth L. Wilson; *Declaratory Ruling* at 7.

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these agreements suggest exactly the contrary – that there are on going terms of interconnection at issue, and that the effect of the agreements has ramifications for the ongoing interconnection relationship. Qwest therefore has begun to use this rubric to keep secret its agreements that do effect on-going terms of interconnection. As the Staff in Colorado has recommended to the full PUC, “the Commission should reject Qwest’s recommended treatment of so-called ‘backward looking consideration’ as being a too narrow interpretation of the [Colorado PUC’s] provisional definition.”<sup>29</sup>

This is completely consistent with AT&T’s continuous warnings that Qwest was using the request for the *Declaratory Ruling* as a screen and subterfuge for continuing its discrimination. As the Commissioners in Minnesota have now recognized:

Qwest was able to define interconnection in its SGAT well in advance of getting this advice that it supposedly needed from the FCC. And if Qwest had applied its own SGAT definition to what we have in front of us, they’d have been filed, right? I mean, that’s about as simple as life gets. And it sure blows away the, oh, my god, we’re so confused argument.<sup>30</sup>

As the counsel for the Minnesota Department of Commerce has stated, the “evidence shows that the only struggle that was in Qwest’s mind was how to violate the law and how not to get caught.”<sup>31</sup> The Chairman of the Minnesota PUC himself appeared to recognize that Qwest’s confusion over the need to file agreements was a ruse, created to justify a conscious decision not to file discriminatory agreements.<sup>32</sup>

As has been recognized in the most recent hearing in Minnesota and in the Comments from the Staff of the Colorado PUC, Qwest simply cannot be permitted to continue to structure its own filing requirements with impunity. Absent withholding a grant of Section 271 authority until an investigation has been conducted and findings made that Qwest has ceased making excuses, reformed itself and abandoned its inclination to discriminate in its contractual offerings, no finding can be made, and upheld on appeal, that Qwest is in compliance with the Section 271 checklist. Moreover, absent rigorous review in the Section 271 process, Qwest will not only escape unpunished for its transgressions in entering secret interconnection deals, it will

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<sup>29</sup> Colorado Staff Comments at 5.

<sup>30</sup> Minnesota Transcript at 71 (Chairman Scott).

<sup>31</sup> *Id.* at 74.

<sup>32</sup> See Minnesota Transcript at 12-17. Chairman Scott stated that “what happened here is we had a VP who got a little overexuberant and thought that doing some deals with some folks and keeping quiet would **make** her a star in the company and get 271 faster, and it didn’t work. It blew up. ~~Stuff~~ that should have been filed didn’t get filed. I’d have so much more respect for you if you’d come in here and say that, instead of pretending that this was confusing when there isn’t a soul from Qwest who is saying it **was** confusing.” *Id.* at 12-13. Slightly later, the Chairinan noted that “it sure feels a lot more like **an** attempt to end run this commission than it does to really get guidance from the FCC.” *Id.* at 17.

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be rewarded with the benefits of entering the interLATA market against competitors it has intentionally weakened through the process.”

**111. Qwest Cannot Deflect or Defer Consideration Of Its Actions.**

As part of its effort to defer any responsibility for its past and ongoing discriminatory efforts, Qwest claims that Section 271 proceedings are not the place to resolve the interconnection obligations of incumbent LECs. Qwest cites the Commission’s decision in *BellSouth Georgia/Louisiana Section 271*, where the Commission refused to mandate specific points of interconnection for CLECs in the order resolving that proceeding.<sup>34</sup> As discussed above, however, Qwest made the conscious choice to enter interconnection agreements it knew or clearly should have known constituted discrimination.<sup>35</sup> Qwest’s knowing and intentional discrimination, both past and on-going, directly violates numerous checklist items. Unlike the novel questions raised in the *BellSouth Georgia/Louisiana Section 271* proceeding, Qwest’s transgressions, which violated even the most narrow readings of Sections 251 and 252, do not involve questions of policy that need to be addressed in rulemaking proceedings of general applicability. The Commission must address the transgressions of discrimination prior to rewarding Qwest with a grant of its authority to enter the long distance market.

Finally, Qwest asserts that any findings that might be made about its entry into unfiled agreements would not contradict the record evidence that its local markets are open to competition and will remain open.<sup>36</sup> Qwest’s discriminatory practice in entering and perpetuating the effect of secret deals is not, however, as Qwest would have it, simply one factor to be considered in assessing the public interest. Instead, it is a probative factor that Qwest has not complied with the checklist requirements for nondiscrimination. Neither this Commission nor the state commissions can simply ignore the impact of the secret deals on Qwest’s compliance with the checklist, referring to some post-interLATA authority proceeding questions of punishment for Qwest’s discriminatory conduct. Instead, like the Minnesota PUC, the commissions must develop a record that supports the conclusion that Qwest has eliminated its discriminatory conduct before it can support a finding that Qwest has met the Section 271 checklist and justified a grant of its application for Section 271 authority.

The apparent view of the states and DOJ that it is appropriate for the Commission to approve Qwest’s Applications while state review of the previously-unfiled agreements is ongoing, and while state investigations of Qwest’s secret deals misconduct are continuing, therefore is without merit. The Act makes open markets and checklist compliance a *pre-*

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<sup>33</sup> See Wilson Reply Declaration, ¶¶ 11-15 (discussing discrimination and weakening of the workshop process).

<sup>34</sup> See Qwest Reply at 63 citing *BellSouth Georgia/Louisiana Section 271*, ¶ 207.

<sup>35</sup> See *supra* text accompanying 11.28 and Minnesota Transcript at 71 (discussing Chairman Scott’s view of the obviousness and intentional nature of Qwest’s discrimination in entering secret deals).

<sup>36</sup> See Qwest Reply at 63-64.



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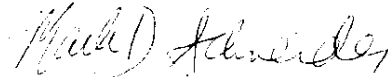
*condition* to long distance entry by a BOC.<sup>37</sup> Because Qwest's systematic discrimination is at the heart of the Act's market opening obligations, the only lawful course of conduct is for the Commission to deny Qwest's application until the Commission is certain that Qwest has filed *all* of its secret deals and established a record that eliminates the taint of those deals.<sup>38</sup> Approving Qwest's multi-state application at this juncture would reward Qwest's subversion of the section 271 process and make a mockery of the Act.

### Conclusion.

For the reasons discussed above, the Commission must reject Qwest's effort to secure interLATA entry into multiple states before it demonstrates that it has eliminated its pervasive practice of entering into secret, discriminatory interconnection arrangements, as well as eliminated the effects of its past discrimination. At the end of the day, the Commission cannot make a finding that Qwest has satisfied its nondiscrimination obligations based on the current record. As the proceedings in Minnesota, Colorado and other states make clear, the Commission does not yet have a complete picture of the scope and extent of Qwest's secret deals discrimination. In particular, Qwest has not come clean with respect to its discrimination through secret *oral* interconnection agreements. Accordingly, the Commission cannot make a finding of checklist compliance that would survive judicial review.

Please feel free to direct any questions, comments or inquiries concerning this matter to the undersigned.

Very truly yours,



Mark D. Schneider

cc: Michelle Carey  
Michael Carowitz  
Linda Kinney  
Carol Matthey  
Elizabeth Yockus

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<sup>37</sup> See generally 41 U.S.C. § 271.

<sup>38</sup> It is worth noting the "final thought for the day" of Chairman Scott of the Minnesota PUC at the end of the hearing on the record before the ALJ: "if you really think about it, what distinguishes one state from another really isn't the commission as much as it's consumer advocates, because commissions can only do what the records in front of them allow them to do. And I think if you gave this record to any given Commission in the Qwest 14-state region, I'm not sure the result would be much different at all. What's different is that they don't have this record in front of them." Minnesota Transcript at 166.

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF MINNESOTA

Gregory Scott, Chair  
Marshall Johnson, Commissioner  
Leroy Koppendrayer, Commissioner  
Phyllis Reha, Commissioner

In the Matter of the Consideration  
of the Complaint of the Minnesota  
Department of Commerce Against  
Qwest Corporation Regarding Unfiled  
Agreements

PUC Docket No: P-421/C-02-197

Minnesota Public Utilities Commission  
350 Metro Square Building  
121 Seventh Place East  
St. Paul, Minnesota  
Large Hearing Room  
October 21, 2002

Met, pursuant to notice, at 9:35 in the  
morning.

COURT REPORTER: Angie D. Threlkeld, RPR CRR

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1 CHAIR SCOTT Let's go ahead and get  
2 started. Good morning, everyone. It's the 216 day  
3 of October and the year 2002. This is a  
4 telecommunications agenda meeting of the Minnesota  
5 Public Utilities Commission. We have all four  
6 commissioners in their chairs this morning. I am  
7 told, at least unofficially, that this governor will  
8 not be filling the open spot on the commission. And  
9 so I suspect we will stay as four for some period of  
10 time.

11 Commission counsel, Karen Hammel, is with  
12 us; and Peter Brown has the power of the pen.

13 Mr. Oberlander, if you would, please.

14 MR. OBERLANDER: Good morning,  
15 Commissioners. Commissioners, the item in front of  
16 you this morning is consideration of the complaint  
17 of the Minnesota Department of Commerce against  
18 Qwest Corporation regarding unfilled agreements.  
19 That in Docket P-421/C-02-197.

20 Commissioners, commission staff has  
21 prepared briefing papers for that item. The  
22 briefing papers have been distributed to the  
23 commission and made available to all parties  
24 Mr. O'Grady is available if there are any questions  
25 at this point. We do not have any prepared comments

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1 MS. LEHR: Lesley Lehr with MCI/WorldCom

2 CHAIR SCOTT: Are we okay with our  
3 technical -- You okay, Mr. Oberlander?

4 MR. OBERLANDER: Mr. Chair, we believe  
5 our sound system is recording --

6 CHAIR SCOTT: Okay.

7 MR. OBERLANDER -- at this point.

8 CHAIR SCOTT: Fine. And let me just  
9 remind folks at the beginning here, we do have a  
10 court reporter here with us this morning. So let's  
11 try to be good to her.

12 In terms of process, it's the  
13 department's complaint, but at least at the ALJ  
14 level also the department's victory. The only party  
15 that filed exceptions is Qwest. It would seem that  
16 it might make sense to have Qwest go first instead  
17 of the department.

18 Mr. Alpert?

19 MR. ALPERT: We have no objection.

20 CHAIR SCOTT: All right. Let's have  
21 Qwest go first then.

22 MR. SPIVACK: Thank you chair Scott.  
23 The first thing I'd like to do, if I could, is just  
24 request the commission's guidance on the procedure.  
25 We had suggested that their proceeding be bifurcated

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1 or summary at this point.

2 CHAIR SCOTT: All right. Thank you,  
3 Mr. Oberlander.

4 Any questions at this point for staff?

5 No.

6 All right. There are some folks at the  
7 table already. Let me just extend the invitation to  
8 anyone else who doesn't know about our process that  
9 wants to be a part of the discussion, you should  
10 come on up to the table.

11 Mr. Topp, let's start with you and let  
12 folks know who's sitting here.

13 MR. TOPP: Microphone is a bit away from  
14 me, but Jason Topp from Qwest.

15 MR. SPINACK: Chair Scott, Commissioners,  
16 Peter Spivack on behalf of Qwest. With me is  
17 Douglas Nazarian.

18 CHAIR SCOTT: Okay.

19 MR. WITT: Good morning, Mr. Chairman.  
20 My name is Gary Win, W-I-T-T, representing AT&T  
21 Communications of the Midwest.

22 MR. ALPERT: Steve Alpert and behind me  
23 Priya Patel representing the Department of Commerce.

24 MR. MARKER: Good morning, Mr. Chair.  
25 Pete Marker for the RUD.

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1 into separate proceedings. The first one the  
2 exceptions and whether or not to adopt the ALJ's  
3 report and recommendation, and the second following  
4 further briefing on the penalty procedure -- excuse  
5 me, on the amount of the penalty, if any, that  
6 should be imposed.

7 And I would like to request, if I could,  
8 a reading from the commission since it will affect  
9 the scope of my comments.

10 CHAIR SCOTT: fair enough. Let's -- I  
11 guess maybe we should take the -- whether to adopt  
12 the ALJ report first and then deal with the issue of  
13 remedies, do you think, my fellow commissioners?  
14 Are you okay with that? All right. Let's do that.  
15 So let's first just focus on the adoption of the ALJ  
16 report.

17 MR. SPIVACK. Thank you, Chair Scott.  
18 Chair Scott, Commissioners, on behalf of Qwest we  
19 appreciate the opportunity to appear in front of you  
20 and comment in the unfilled agreements matter. We  
21 read with great interest ALJ Klein's recommendation  
22 that the parties attempt to achieve a creative  
23 solution in this case. In the past we understand  
24 from comments that the commission has made that  
25 there's been some frustration that fines that have

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1 been imposed go into the general fund. And we do  
2 want to state at the outset that we have been and  
3 are interested in working towards those creative  
4 solutions.

5 In considering the report and  
6 recommendation, we wish to return to the point that  
7 we made at the outset of these proceedings, and that  
8 is that we believe that this case is fundamentally  
9 about the drawing, what line should be drawn under  
10 Section 252 of the act. We also wish to point out  
11 that we believe that the lines and the line drawing  
12 that's at issue here occurred in the past before  
13 there was a clear standard that was set out by the  
14 FCC. Indeed, the most recent agreement that's at  
15 issue in this docket was entered into in July of  
16 2001, approximately a year and a half ago. Thus, we  
17 believe and we hope that the unfiled agreements  
18 matter relates to past conduct as opposed to present  
19 or future conduct. And I'd like to start by talking  
20 about the -- what we believe are significant and  
21 far-reaching remedial steps that Qwest has put into  
22 place to ensure that these types of allegations  
23 remain in the past and do not recur.

24 First, the wholesale group at Qwest has  
25 undergone a management changeover. Qwest has a new

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1 wholesale, who departed Qwest at the end of 2001.

2 CHAIR SCOTT: Mr. Casey is the one  
3 pleading the fifth amendment in the proceedings out  
4 in DC?

5 MR. SPIVACK: Yeah Yeah.

6 CHAIR SCOTT: And how does Audrey  
7 McKenney fit into this chain?

8 MR. SPIVACK: Well, since October 11th  
9 Audrey McKenney is no longer with Qwest. She is the  
10 former senior vice president of wholesale business  
11 development. And, as the commission knows, she is  
12 the signatory on many of these agreements.

13 CHAIR SCOTT: Who replaced Audrey  
14 McKenney?

15 MR. SPIVACK: Her -- Her department,  
16 wholesale business development, has actually been  
17 reorganized and restructured. So her functions --  
18 Her department's functions have been taken over by  
19 other departments within Qwest, including wholesale  
20 service delivery.

21 CHAIR SCOTT: All right. Oohead.

22 MR. SPWACK: Thank you. Since March of  
23 2002 Qwest provided the agreements at issue in this  
24 case to the commission for public review. Although  
25 they were not available for formal opt in as of

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1 executive vice president of wholesale, Pat Engels,  
2 who was brought in specifically by Richard Notebaert  
3 to head up that group.

4 CHAIR SCOTT: Brought in from where?

5 MR. SPIVACK: Brought in from I  
6 believe -- That's a good question. Let me check.  
7 She was with Ameritech prior to her -- a break in  
8 her service and then came into Qwest.

9 CHAIR SCOTT: And Ameritech did a better  
10 job with wholesale relationships than Qwest has  
11 done?

12 MR. SPIVACK: Well, we think that she  
13 will act under the FCC's order, that she will --

14 CHAIR SCOTT: I'm just trying to get a  
15 sense of how impressed we should be by this change.

16 MR. SPIVACK: Well, I think that she is  
17 someone who does have a record of accomplishment at  
18 Ameritech, and I think she's someone who has the  
19 direction from the top management at Qwest to ensure  
20 that compliance is first and foremost.

21 CHAIR SCOTT: Who is she replacing?

22 MR. SPNACK: She is replacing Gordon  
23 Martin, who was at Qwest for approximately ten  
24 months to a year. He, Mr. Martin, replaced Gregg  
25 Casey, the former executive vice president of

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1 March 2002, we believe it's relevant that at least  
2 they were available publicly for CLECs to examine  
3 and use as a basis of negotiations. Since May of  
4 2002 Qwest has been operating under a broad filing  
5 standard regarding new agreements that we believe is  
6 substantively the same as that the FCC adopted on  
7 October 4th. Under that standard Qwest has been  
8 filing all new agreements containing forward-looking  
9 obligations relating to 251(b) and (c) services.

10 Now that the FCC has announced its  
11 standard, Qwest does not intend to seek appellate  
12 review of that standard. Qwest, being the  
13 petitioner, will adopt that standard for reviewing  
14 new agreements on a going-forward basis. Since May  
15 of 2002 as well, Qwest created a committee of  
16 experienced attorneys and employees with --

17 CHAIR SCOTT: We were going to talk about  
18 whether or not to adopt the ALJ report; right? It  
19 seems to me you've kind of asked for guidance, I  
20 gave it to you; and then you went, and we're pretty  
21 much talking about remedies, aren't we?

22 MR. SPIVACK: Well, I'm trying to put a  
23 context around the ALJ's report, which is that it  
24 relates to past conduct as opposed to future  
25 conduct.

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1 CHAIR SCOTT: Oh, I see. All right.  
 2 Okay  
 3 COMMISSIONER JOHNSON: Peter, could you  
 4 pull your microphone a --  
 5 MR. SPIVACK: Sun.  
 6 COMMISSIONER JOHNSON: -- little closer  
 7 to you? Thank you  
 8 MR. SPIVACK: The committee that review  
 9 wholesale agreements meets once a week at 7:30 in  
 10 the morning as well as on an as needed basis. And  
 11 any agreement that contains forward-looking terms  
 12 has been put into a separate interconnection  
 13 agreement amendment and filed with the relevant  
 14 state commissions. Qwest will apply the FCC order  
 15 and this committee has been charged with applying  
 16 the FCC order to agreements, including past -- any  
 17 past Minnesota agreements that are on file -- excuse  
 18 me, that are still in effect and have not been named  
 19 by the Department of Commerce in its complaint.  
 20 These measures Qwest sincerely hopes and believes  
 21 will ensure that it is compliant in the future with  
 22 the Telecommunications Act of 1996, the FCC's order,  
 23 and Minnesota state law.  
 24 Turning, Chair Scott, to the issue of the  
 25 past conduct. As I mentioned at the outset, we

1 of the agreements that are at issue.  
 2 CHAIR SCOTT: You know, I'd have so much  
 3 more respect for you folks if you would come in here  
 4 and say, You know what under U S WEST people really  
 5 didn't care about 271 at this company; they said  
 6 they did, but they really didn't; they really  
 7 preferred to have their monopoly. Then Qwest came  
 8 in and Nachio made a big push for 271. And what  
 9 happened here is we had a VP who got a little  
 10 overexuberant and thought that doing some deals with  
 11 some folks and keeping quiet would make her a star  
 12 in the company and get 271 faster, and it didn't  
 13 work. It blew up. Stuff that should have been  
 14 filed didn't get filed.  
 15 I'd have so much more respect for you if  
 16 you'd come in here and say that, instead of  
 17 pretending that this was confusing when there isn't  
 18 a soul from Qwest who is saying it was confusing.  
 19 Do you see what I'm saying? But you don't do that.  
 20 You were getting close this morning. I thought we  
 21 might get there, but you didn't. Then you went back  
 22 to this, my god, we're so confused; we're so  
 23 confused we don't know how we got here from the  
 24 airport. It doesn't -- It just doesn't make any  
 25 sense. I feel like I have stupid stamped on my

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1 respectfully suggest that this is a case about line  
 2 drawing. When this proceeding began Qwest pointed  
 3 out that there was not an existing standard or  
 4 belief that -- for filing interconnection agreements  
 5 under Section 252 of the act. And all parties, it  
 6 seemed, agreed that the FCC had never set out a test  
 7 or a definition. Because of this lack of clarity,  
 8 Qwest sought the FCC's guidance on the definition of  
 9 an interconnection agreement and what agreements  
 10 must be filed under Section 252.  
 11 CHAIR SCOTT: Would you please tell me  
 12 who the Qwest witness is who came to you and said,  
 13 But for my lack of clarity as to whether or not  
 14 there agreements needed to be filed, I would have  
 15 filed them? Who is the witness that says that?  
 16 MR. SPIVACK: Well, in the record there's  
 17 no witness who provided that testimony.  
 18 CHAIR SCOTT: I noticed that. So who is  
 19 the person that says that?  
 20 MR. SPIVACK: Well --  
 21 CHAIR SCOTT: Tell me why this isn't just  
 22 an attempt by good lawyers to put a spin on bad  
 23 facts, and the spin doesn't fit very well with the  
 24 facts.  
 25 MR. SPNACK: Well, let me turn to some

1 forehead.  
 2 MR. SPNACK: Chair Scott, we're  
 3 certainly not attempting to --  
 4 CHAIR SCOTT: Yeah; you are.  
 5 MR. SPNACK: -- run something by the  
 6 commission. I mean, the issue here is, at least in  
 7 some cases, some of these agreements -- let's take  
 8 some of them. I mean, some of these agreements  
 9 relate in the level of detail that needs to be  
 10 filed. Things like the on-site provisioning team.  
 11 That wasn't a provision that was filed and approved  
 12 by the commission.  
 13 CHAIR SCOTT: So certainly there's  
 14 evidence in the record then that shows this internal  
 15 Qwest struggle with whether these agreements needed  
 16 to be filed?  
 17 MR. SPIVACK: Well --  
 18 CHAIR SCOTT: Well, no, there isn't.  
 19 MR. SPIVACK: The evidence in the record  
 20 I think comes from -- in two manners. I mean, the  
 21 first is that some of the agreements weren't -- were  
 22 filed, some of the provisions were filed; and it's a  
 23 question of the elaboration or the detail that  
 24 needed to be filed. The other evidence in the  
 25 record is that even where the agreements were not

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1 filed, there was an attempt to provide the same  
2 service to all CLECs. So essentially what you have,  
3 we believe, is if you look at that as a record,  
4 you've got situations where there is a question of  
5 or how much detail to file; and then you have  
6 evidence whether there was not an attempt to treat  
7 the CLECs differently.

8 CHAIR SCOTT: And who was struggling with  
9 these decisions? You just told me there's no  
10 witness identified in the record.

11 MR. SPWACK: That's correct. I think  
12 it's --

13 CHAIR SCOTT: Do you know why? Because  
14 there wasn't a struggle. Because there was a  
15 conscious decision not to file them, not a struggle.  
16 I know what happens when people struggle. When  
17 people struggle they call up Mr. Oberlander, who has  
18 been at the commission as long as air, and they ask  
19 him. Or they call up the last staff person they  
20 work with. Or they call up the department and they  
21 say, Hey, would you oppose if we do this or support  
22 if we do that? I know what people do when they  
23 struggle. There's no evidence in the record of a  
24 struggle because there wasn't one.

25 MR. SPIVACK: Well, again, I think I

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1 complete victory for Qwest, according to the papers  
2 you filed.

3 MR. SPIVACK: Well, no, but it was --  
4 there were points at which the FCC did agree with  
5 Qwest's position.

6 CHAIR SCOTT: Yeah.

7 MR. SPWACK: And the FCC did agree that  
8 historical settlements did not need to be filed.  
9 The FCC did agree that form orders and contracts did  
10 not need to be filed. The FCC did agree that  
11 agreements with bankrupt companies did not need to  
12 be filed.

13 CHAIR SCOTT: Were any of those three  
14 things you just articulated relevant to the issues  
15 before the commission?

16 MR. SPIVACK: Well, we believe that the  
17 historical settlements were because some of these  
18 agreements could be put in that context.

19 CHAIR SCOTT: Ob.

20 MR. SPIVACK: We also believe that the  
21 FCC found it necessary to specifically single out  
22 escalation and dispute resolution clauses. And it  
23 indicated that if those provisions were not -- were  
24 generally available -- where -- it indicated  
25 essentially that those provisions would be made

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1 would have to -- I'll make this point once and I will  
2 on, unless the commission has other questions. But  
3 it does seem that from the evidence in the record  
4 over certain of the provisions there was a confusion  
5 over the amount of detail that needed to be filed.  
6 And that confusion is evidenced by the fact that a  
7 provision was filed that related to the same  
8 substance, in effect, and then there was an  
9 implementation of that agreement; and it was that  
10 implementation phase that was not filed. So the  
11 question in those types of agreements really  
12 becomes: Where is the line drawn? And Qwest drew  
13 the line at filing a general provision and then  
14 attempted to fill the business needs of CLECs on an  
15 individual case-by-case basis and, as a result, did  
16 not file the detail of those agreements.

17 And let me answer the chair's question in  
18 another way as well. I think if you look at the  
19 FCC's order, there was not a statement in the FCC's  
20 order that the standard was clear and self-evident.  
21 The FCC did not cite to preexisting orders or case  
22 law. It acted instead as if this was a question of  
23 first impression, which we submit that it was. And  
24 it --

25 CHAIR SCOTT: And the FCC decision was a

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1 available to other CLECs, which would meet the  
2 discrimination point.

3 CHAIR SCOTT: Why didn't Qwest go to the  
4 FCC for guidance back when it was struggling with  
5 whether or not to file these agreements?

6 MR. SPIVACK: I don't know that.

7 CHAIR SCOTT: Yeah. It's curious, isn't  
8 it? Because it sure feels a lot more like an  
9 attempt to end run this commission than it does to  
10 really get guidance from the FCC.

11 MR. SPIVACK: Well, with respect to that,  
12 Chair Scott, I mean, I think what the attempt was to  
13 try to articulate or have a national standard  
14 articulated that would be uniformly applied over the  
15 14-state region that Qwest serves. It was certainly  
16 not an attempt to end run any commission so much as  
17 an attempt to try to get something that could and  
18 would be uniformly applicable. And we hope that's  
19 what we have achieved and what the FCC has provided.

20 We think there's other indications that  
21 this question was not as clear as perhaps some on  
22 the other side of the question might believe. Other  
23 state commissions have adopted different  
24 formulations prior to the FCC's articulation of the  
25 test.

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CHAIR SCOTT: Are we still talking remedies? Because this really doesn't go to whether we should adopt the ALJ's report, does it?

MR. SPIVACK: Well, we believe it goes to the intent or lack thereof in terms of knowingly and intentionally filing these -- these agreements. And we think that the agreements is evident -- or the lack of clarity of the standard is evident in the fact that the parties to this proceeding proposed different standards and standards that were different in some respects, some material respects than the FCC adopted ultimately.

I guess the fundamental concern that we have with the report and recommendation from the standpoint of the evidence in the record is that as to certain of the agreements there is no evidence, we submit, that relates to Qwest's knowledge and intent that these agreements must be filed.

Chair Scott, you pointed out that there's no witness from Qwest who said that there was a struggle or an attempt to arrive at a filing decision. Nor is there a witness, we feel, that Qwest knew that these agreements needed to be filed. And so again and again in the report when there is a finding by the ALJ as to the knowledge and intent of

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Scott. The other issue we think with the ALJ's report and recommendation that runs fundamentally throughout it is that at the Department of Commerce's urging the ALJ essentially made a finding that there was a -- there's per se discrimination; that the mere fact that a CLEC does not have a contractual commitment for a certain type of provision means that it's a fact that there is discrimination. We believe that the FCC order actually indicates to the contrary and that the 1996 act actually requires more; and that is a showing on a case-by-case or agreement-by-agreement basis that there was, in fact, discrimination. And the FCC stated as much in its October 4th order when it talked about escalation and dispute resolution clauses. It stated that unless generally available such as filing -- excuse me, such as being made available on a CLEC's website that an agreement provision relating to escalation or dispute resolution had to be filed as an interconnection agreement. We think that the implication of this as well as the requirements under the 1996 act are that there be proof of actual discrimination as opposed to simply that provision not being in a contract with a particular CLEC. And many of the provisions

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Qwest, we submit that that is not based on a witness, it's not based on a document for the -- you know, for most of the agreements when there are issues about level of detail that needs to be filed or where there were issues about whether or not a particular agreement or provision fit within the definition of an interconnection agreement.

I can turn to the issue of discrimination, if the commission would like to, or I can wait to address this first issue of whether or not to adopt the ALJ's report and recommendation.

COMMISSIONER KOPPENDRAYER: Mr. Chair, Mr. Spivack, I -- back up a moment. You -- I think you were saying that there's no indication in the record that the ALJ put together that there was an -- an intention to not file?

MR. SPIVACK: What I was saying is there's no -- there's no witness who is a participant in the transactions who said we intentionally did not file these agreements.

COMMISSIONER KOPPENDRAYER: Okay.

CHAIR SCOTT: I guess I would say you should just do what you would like to do here this morning.

MR. SPIVACK: Okay. Thank you, Chair

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that were at issue in this case we believe were generally available to CLECs. Things like the FOC standards and the Covad service level agreement. Things like the quarterly vice president meetings and the Eschelon agreements and McLeod agreements. The escalation charts in one of the escalation -- in the Eschelon agreements. The escalation procedures, the Eschelon and McLeod agreements. The Qwest service management teams and the methodology for calculating local switching charges. The commercially reasonable efforts to ensure that service is not affected during the UNE-P conversion. And the listing of the end offices in the LERG, the cad offices that were in the USLink/Infotel agreement. We think that those -- that evidence should be considered because we believe that those provisions were, in effect, available to all CLECs. They were generally available, they were made available by Qwest, and that that is evidence that should be considered by the commission rather than adopting the finding of per se discrimination.

In addition to whether a provision is generally available, we believe there's another inquiry that should be made before there is a finding of discrimination, and that is whether an

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agreement would be available for pick and choose under Section 252(i). Because we believe that if an agreement provision was not available for pick and choose, there cannot be harm to the CLECs that did not have the opportunity to opt into that agreement, and that that's a relevant factor under the penalty statute at issue here. We also think that under the --

COMMISSIONER JOHNSON: So what did you mean by that?

MR. SPIVACK: Well, what I'm trying to say is that if --

COMMISSIONER JOHNSON: If you didn't tell anybody, no one else would know.

MR. SPIVACK: Chair Scott, Commissioner Marshall (sic), what I'm trying to say is it's not so much -- taking for argument's purposes that we didn't tell anyone about the provision so other CLECs did not know about it, we believe that what one must look at is whether, in fact, those CLECs have the same services that were provided in the substantive agreement. So, for example, with an escalation clause, if the CLECs had the opportunity -- the opportunity or received the same escalation procedure as Eschelon or McLeod received

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considerations when determining or when trying to assess whether, in fact, there was discrimination against other CLECs.

COMMISSIONER REHA: Mr. --

COMMISSIONER KOPPENDRAYER: So -- I'm sorry. Go ahead.

COMMISSIONER REHA: No, go ahead.

COMMISSIONER KOPPENDRAYER: So then -- Some of us are attorneys here, and some of us aren't, and I'm not one of them. And that's neither bad nor good; it just takes me longer to understand what you're saying. So if there was no company that could meet the volume term agreement, then the fact that it was not made available could be considered not discriminatory?

MR. SPIVACK: Chair Scott, Commissioner Koppendray, that -- that is exactly the point I'm trying to make.

COMMISSIONER KOPPENDRAYER: So then we would conclude because -- because mother company can't meet that term at that time, the agreement to not let anybody know it has no discriminatory intent at all?

MR. SPIVACK: Chair Scott, Commissioner Koppendray, it has no discriminatory intent. And

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in a contractual commitment, we believe that that's a relevant factor for the commission to take into account.

COMMISSIONER KOPPENDRAYER: But, Mr. Spivack, excuse me, that's also then to assume that the pick and choose has no value.

MR. SPIVACK: Chair Scott, Commissioner Koppendray, we're not saying that the pick and choose has no value. What we're saying is for the -- in the context of trying to determine whether there was discrimination and whether there should be a penalty imposed, that that's a relevant factor to consider is whether there are provisions or preconditions to the particular provision that might make it impossible for other CLECs to opt into that -- that provision. And, you know, certainly some of them were -- controversial provisions could be analyzed that way.

So, for example, with the McLeod oral agreement for a 10 percent discount, one could look at that and say that that was a volume term commitment, if one accepts the ALJ's report, and that as a volume term commitment it was available only to CLECs who could make a similar volume term commitment. So we think that those are relevant

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also, perhaps more importantly, it has no discriminatory impact. There's no effect from the fact that that agreement provision was not made available.

CHAIR SCOTT: Commissioner Reha

COMMISSIONER REHA: Yeah, Mr. Chair. I understand your argument that -- that you feel the FCC indicated in their order of October 4 that simply because the agreements weren't filed you feel that that doesn't mean there's per se discrimination. But -- And your suggestion is that the ALJ found that by failing to -- Qwest failing to file the interconnection agreements that it was per se discrimination. And so reading that argument, I went back again through the ALJ's report to try to see whether that was accurate. And I found -- and also within the record I found a lot of information in there where the ALJ didn't simply say by failing to file the agreement it was per se discrimination. They were specific finding that there was discrimination.

So, for example, there's one finding that goes in a little more detail that I think you've claimed that maybe the provisions are available either on your website or the provisions are



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1 available in your SGAT. First of all, there doesn't  
2 seem to be any evidence in the record about your  
3 website and whether or not this information was  
4 available on your website or not. And I would think  
5 that if it were available during the course of the  
6 hearing, that evidence should have come out and had  
7 been offered to show, hey, you know, we had this  
8 fully available on our website for any CLEC to see  
9 and to attempt to enter into some negotiation. But  
10 that isn't in the record. At least not that I could  
11 find.

12 And the one mention of the SGAT in  
13 Eschelon agreement number -- Eschelon agreement  
14 number 1 is a finding in 76 that says, Qwest's SGAT,  
15 however, permits no discovery except for the  
16 exchange of documents being necessary by the  
17 arbitrator to an understanding and determination of  
18 the dispute. And the judge goes on to say, There's  
19 no approved interconnection agreement in Minnesota  
20 that gives any CLEC the same dispute resolution  
21 mechanism set forth in that special agreement.

22 So I think that's more than saying that  
23 somehow failing to file the interconnection  
24 agreement is per se discrimination. I think there's  
25 specific facts upon which the judge has relied and

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1 made findings on that indicate that there was indeed  
2 discriminatory impact as a basis of a term and  
3 condition that wasn't available to CLECs.

4 Now, granted there's no specific evidence  
5 in the record that CLEC X was harmed X amount of  
6 dollars by not being permitted to pick and choose a  
7 particular matter that the -- a special agreement  
8 set forth for a competing CLEC; but I don't think  
9 that that's what's necessary, and I don't think  
10 that's what the FCC is saying. So I guess I  
11 disagree with your conclusion that the ALJ just  
12 simply said it's per se discrimination because the  
13 interconnect -- interconnection agreement wasn't  
14 filed.

15 And then a second thing too that disturbs  
16 me about this and -- by reading your -- by reading  
17 the FCC's order and reading your post-hearing --  
18 your comments. -- most recent comments that  
19 discuss that is that throughout this proceeding it's  
20 Qwest that seems to be making the unilateral  
21 decision as to whether or not an interconnection  
22 agreement should or should not be filed. And, I  
23 mean, there's even circumstances where one of the  
24 CLECs wanted a written agreement and suggested that  
25 it wanted -- they wanted it to be filed, and the

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1 company absolutely refused. So that disturbs me,  
2 that the holder of the product, the holder of the  
3 ability for the CLEC to be able to compete is the  
4 one that's unilaterally making the decisions as to  
5 whether or not agreements should or shouldn't be  
6 filed.

7 And I -- We're not at the penalty phase  
8 at this particular point, but I would certainly be  
9 supportive of nonmonetary penalties in addition to  
10 monetary penalties. But nonmonetary penalties -- I  
11 don't know if penalties is the right word -- but  
12 some circumstances to avoid that unilateral activity  
13 on the part of Qwest that -- that perhaps we should  
14 look at every interconnection agreement and perhaps  
15 we should be notified whenever there's a negotiation  
16 that's going on with respect to the provisioning of  
17 ongoing interconnection terms.

18 So I guess if you want to address some of  
19 those comments, Mr. Spivack, go right ahead.

20 MR. SPIVACK: Chair Scott, Commissioner  
21 Reha, thank you. When we're talking about the ALJ's  
22 findings of per se discrimination, what we are  
23 referring to is that the -- the fact that in the  
24 report again and again what the ALJ concludes is  
25 that by failing to make the provision available to

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1 other CLECs, Qwest knowingly and intentionally  
2 discriminated against them in violation of 47 U.S.C.  
3 Section 251. And our response is that there is  
4 evidence in the record showing that other CLECs  
5 received the same services, that other CLECs  
6 received the same ability to escalate disputes about  
7 provisioning and about billing, that other CLECs  
8 received the same -- the same types of services that  
9 Qwest provided to McLeod and Eschelon and the other  
10 CLECs who are parties to the agreement. So you're  
11 right there's not evidence that, for example, prior  
12 to March or prior to August 2002 Qwest was posting  
13 these provisions on its website. You're absolutely  
14 right. But what we are referring to is that they  
15 are -- they were made generally available in other  
16 ways.

17 COMMISSIONER REHA: Well, how -- how was  
18 the -- for example, the discovery privilege in the  
19 special Eschelon 1 agreement made available to other  
20 CLECs if they didn't know about it?

21 MR. SPIVACK: That particular provision  
22 to my knowledge was not.

23 COMMISSIONER REHA: Okay.

24 MR. SPIVACK: So --

25 COMMISSIONER REHA: Because, I mean,

E (Pages 26 to 29)

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1 there, I think there's some detail that there was  
2 discrimination, because what was available to  
3 someone in a special status, privileged status was  
4 not available to all others. And I find other --  
5 That's just one example. There are other examples  
6 in the record and in the findings that there are  
7 factual -- there's factual information that treated  
8 those in the specialized status where there was a  
9 special agreement, secret agreement that wasn't  
10 available generally to other -- other CLECs. And in  
11 those circumstances I don't see how you can say that  
12 that was not -- didn't have a discriminatory impact.

13 MR. SPIVACK: Chair Scott, Commissioner  
14 Reha, if I -- if I may answer that question. That  
15 I -- I think actually is what we would -- what we  
16 would suggest is that there is a distinction between  
17 a provision not being available to other CLECs and  
18 it actually having a discriminatory impact. Because  
19 there is not, for example, evidence in the record  
20 that CLECs went into disputes and because they did  
21 not have access to the two discovery depositions  
22 that are provided for in the -- the particular  
23 provision that you cite that they suffered as a  
24 result

25 COMMISSIONER REHA: So you feel that

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1 Reha, it's -- We believe it doesn't beg the question  
2 or it isn't a circular argument because in many  
3 instances these are provisions that don't give a  
4 CLEC an advantage, we believe, over another.

5 COMMISSIONER REHA: Discounts don't give  
6 one CLEC an advantage over another?

7 MR. SPIVACK: Now, there -- there -- Now,  
8 what I'm -- Chair Scott, Commissioner Reha, what I'm  
9 talking about is sort of the nonmonetary-related  
10 provisions. You know, clearly discounts and other  
11 types of monetary payments bring in different issues  
12 and --

13 COMMISSIONER REHA: Specialized personnel  
14 availability to one CLEC not available to others,  
15 that's not an advantage?

16 MR. SPIVACK: Chair Scott, Commissioner  
17 Reha, that's a provision that we believe was  
18 available to --

19 COMMISSIONER REHA: Where, on your  
20 website?

21 MR. SPIVACK: In a filed interconnection  
22 agreement, the on-site provisioning team was  
23 available.

24 COMMISSIONER JOHNSON: Later on. Just  
25 recently.

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1 there should be testimony in evidence with respect  
2 to some type of monetary damage, if you will, or  
3 some proof of some other CLEC damage for us to be  
4 able to conclude that your failing to file the  
5 agreements and all the other testimony evidence that  
6 goes along with that was discrimination?

7 MR. SPIVACK: Chair Scott, Commissioner  
8 Reha, what we would suggest is that the commission  
9 look at all of the factors, including whether or not  
10 there was an impact, and that we believe that the --  
11 there is some context that is provided by whether or  
12 not there is any evidence of a discriminatory  
13 impact.

14 COMMISSIONER REHA: Okay. Because it  
15 seems it's kind of a circular argument. Because how  
16 could a CLEC who doesn't know whether these  
17 provisions are available to them come in and prove  
18 affirmatively that -- that and quantify their harm?

19 MR. SPIVACK: Chair Scott, Commissioner  
20 Reha, there -- in many instances we believe  
21 that they couldn't because here wasn't harm; that  
22 they didn't --

23 COMMISSIONER REHA: That begs the  
24 question, doesn't it?

25 MR. SPIVACK: Chair Scott, Commissioner

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1 MR. SPIVACK: Chair Scott, Commissioner  
2 Johnson, it was actually filed in I believe January  
3 2001 as an interconnection agreement -- I believe  
4 that's the correct date -- and approved by the  
5 commission at that time.

6 Chair Scott, Commissioner Reha, there are  
7 two other issues that you've raised that I'd like to  
8 address. I mean, the first is the issue about  
9 whether or not these were unilateral decisions for  
10 the most part by Qwest. I guess we respectfully  
11 disagree. We think that there were two parties to  
12 each of these agreements. There may have been --  
13 Well we think that there were two parties to these  
14 agreements and --

15 COMMISSIONER REHA: And I agree with you.  
16 I don't think some of the CLECs here, the ones that  
17 entered into the special privilege agreements with  
18 the company, have clean hands here by any means.  
19 And, you know, perhaps we could -- should open up a  
20 new investigation to look at those issues as well.  
21 But there are circumstances here where Qwest made  
22 the unilateral decision not to file these, and  
23 there's specific finding of that effect in the  
24 ALJ's report

25 MR. SPIVACK: Chair Scott, Commissioner

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1 Reha, there are, I believe, some provisions where  
 2 that -- that -- the documents suggest that. I think  
 3 that that is -- that is -- Another -- Chair Scott,  
 4 Commissioner Reha, another issue that you addressed  
 5 is sort of on a going-forward basis what to do. You  
 6 know, I've tried to outline the remedial steps that  
 7 Qwest has taken. And I believe that those are --  
 8 that those go a long way -- we are addressing the  
 9 concerns that the commission may have. Qwest  
 10 certainly is not, however, averse to whatever the  
 11 commission feels is necessary from the standpoint of  
 12 a compliance agreement or some kind of compliance  
 13 piece to ensure that that process is working  
 14 correctly. I do not want to leave anyone with the  
 15 impression that Qwest has any objection to any such  
 16 provision.

17 COMMISSIONER REHA: I appreciate that.

18 MR. SPIVACK: Chair Scott, Commissioner  
 19 Reha, just one other -- one other point I think that  
 20 been noting is that with regard to the provisions  
 21 at issue in this, the only testimony from CLECs that  
 22 they would have been interested or would have opted  
 23 into the nonmonetary provisions related to the  
 24 on-site provisioning team. And yet we thought it  
 25 was interesting that in the record and in the

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1 these provisions in many instances were available to  
 2 CLECs in other ways.

3 MR. TOPP: Chair Scott.

4 CHAIR SCOTT: Mr. Topp.

5 MR. TOPP: If it would be possible for  
 6 us, there were a couple of issues raised that if we  
 7 could have a moment to discuss kind of before we  
 8 wrap up our presentation --

9 CHAIR SCOTT: Yeah.

10 MR. TOPP: -- we would appreciate that.

11 CHAIR SCOTT: Yeah, that's no problem.  
 12 Okay. How much time? Do you want us to take a  
 13 break or what do you want?

14 MR. TOPP: Yeah, if we would take a five,  
 15 ten-minute break, that would be great.

16 CHAIR SCOTT: Let's come back at 10:30.  
 17 It's 20 past. Let's come back at 10:30. We'll take  
 18 a break.

19 (Whereupon, a recess was held from  
 20 10:20 a.m. to 10:35 a.m.)

21 CHAIR SCOTT: All right. Let's come back  
 22 together after our break. Go back to Qwest.  
 23 Mr. Topp.

24 MR. TOPP: Yes, thank you, Chair Scott  
 25 I just wanted to follow up on a couple of points

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1 hearings when asked the CLECs stated that they did  
 2 not review the filed interconnection agreement and  
 3 that they did not know that the on-site provisioning  
 4 team had been filed. And we believe that that's  
 5 important because, you know, with regard to the one  
 6 provision that they were focusing on, they did  
 7 not -- the CLECs did not take advantage of the fact  
 8 that that had been filed, been made publicly  
 9 available and seek to opt in.

10 Chair Scott, the basic themes that you've  
 11 noted that our -- run through our submission are  
 12 that there was not a standard, that there was  
 13 evidence of -- there was evidence of confusion.  
 14 There has been evidence of confusion, if you look at  
 15 the way that the state commissions have approached  
 16 this with the way the parties tried to define their  
 17 filing obligations; that the evidence lacks, we  
 18 believe, evidence that -- the hearing evidence lacks  
 19 a showing that there was a knowing and intentional  
 20 decision not to file these provisions. And, perhaps  
 21 most importantly, that the findings that the ALJ  
 22 made regarding discrimination we believe should be  
 23 examined because they need to take into account the  
 24 evidence that Qwest submitted regarding the  
 25 provision of services to CLECs and the fact that

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1 that you asked. Specifically with respect to our  
 2 exceptions. I mean, first of all, I want to state.  
 3 you know, we're here in a context where we've got  
 4 concerns about an order and we're facing significant  
 5 penalties, and so we're raising those concerns as a  
 6 part of this proceeding.

7 But, Chair Scott, you asked a question  
 8 about who struggled with these particular issues,  
 9 and I think that does turn to a heart of an issue  
 10 that we've really addressed within the company. I  
 11 mean, the fact of the matter is when these  
 12 agreements were in place --

13 CHAIR SCOTT: Talking about evidence in  
 14 the record. I don't want after the fact come tell  
 15 the commissioner about how the lawyers struggled. I  
 16 want evidence in the record that justifies this  
 17 legal theory that is basically the entire  
 18 post-hearing brief.

19 MR. TOPP: And my point is is at the time  
 20 that these agreements were entered into, the people  
 21 that should have been struggling with these issues  
 22 within the company were not. There was not an  
 23 internal formal process in place for making these  
 24 sorts of decisions. And what I really want to make  
 25 clear to the commission is we have -- you know, we

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1 have brought formal controls in place, we've gotten  
2 the people who should be struggling with these  
3 issues involved in those issues. We're open when we  
4 get to the remedics portion of this proceeding to  
5 making sure that that is an open process in which,  
6 you know, interested parties are involved and can  
7 see what we're doing and are comfortable with the  
8 way we are approaching these issues. And I wanted  
9 to emphasize that I think the concerns that you have  
10 raised are concern that we as a company are  
11 addressing and will continue to address on a  
12 going-forward basis.

13 CHAIR SCOTT: But how often will we do  
14 this? How many times will we do this? You know,  
15 I -- I sat here at the U S WEST/Qwest merger, and I  
16 would have separated U S WEST because I didn't  
17 believe U S WEST had what it took to meet its  
18 responsibilities under the federal act. I thought  
19 it proved it time and time again. And people looked  
20 at me like you might a senile old grandfather and  
21 panned me on the hand and smiled and said, Well,  
22 just -- you just wait; Qwest is going to do better,  
23 it will be all right; Qwest is going to do better.  
24 So I said, All right, I won't pursue it; I'll --  
25 I'll wait and see what Qwest does.

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1 This docket to me is a docket that needs  
2 to open the eyes of one of two parties; either you  
3 or me, this commission. Somebody's eyes need to be  
4 open. Either you need to say, Oh, my god, we  
5 screwed up; or I need to say, Do we want this kind  
6 of phone company in our state. Because now we've  
7 given Qwest same time. We've given Qwest time to  
8 show that they would be different. They are  
9 different. They're worse. They're better at it  
10 because they're smarter, but they're worse. And  
11 this docket shows that it started as soon as you  
12 came into Minnesota.

13 And so for you to sit there today and  
14 tell me about these remedial measures you've taken,  
15 I have to tell you it rings kind of hollow, just  
16 like it rings hollow to hear that now you've got  
17 Richard Notebaert at the helm. Because Joe Nacchio  
18 was going to be different. And I went around and  
19 told people that. I believed it. Yeah, it's going  
20 to be different, it's going to be better. It's not.

21 And so I think there's a big issue for  
22 this commission today that goes well beyond money,  
23 and it goes to is this the kind of phone company we  
24 want in our state. Because you know what, we don't  
25 have to have it. We don't have to have it.

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1 And I have to tell you I would not have  
2 known Audrey Mc Kenney was a bad apple. I would not  
3 have known. And you can give me this list of names  
4 that you've replaced and things you've done. I  
5 wouldn't know when the bad apples are. And that  
6 tells me that I really am not in a position where I  
7 can fashion the management that can successfully  
8 pull this off under the federal act. It just tells  
9 me that maybe we need new blood. Maybe we need new  
10 people to do it.

11 MR. TOPP: Well, and I think, you know,  
12 we have put in new people. So there is -- I mean --

13 CHAIR SCOTT: Again. Again. You see,  
14 again. And when does this commission say they just  
15 can't do it; they can't get the job done? Seven  
16 years in February since the passage of the act.  
17 We're still sitting in Minnesota hearing about how  
18 you're putting people in who hopefully will get the  
19 job done.

20 MR. TOPP: And a lot of the issues that  
21 have been raised over the last seven years there  
22 have been terrific strides made by our company to  
23 address those issues. If you look at our wholesale  
24 performance, it has improved dramatically. If you  
25 look at investment within the state --

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1 CHAIR SCOTT: But now we know that the  
2 wholesale performance didn't even have all the  
3 performance data in it because you had deals with  
4 CLECs that said they'd keep it out.

5 MA. TOPP: That --

6 CHAIR SCOTT: See? So, you know, there's  
7 a big credibility issue here with you folks.

8 MR. TOPP: Well --

9 CHAIR SCOTT: And it's not supposed to  
10 affect 271. No. The market's open. We're sitting  
11 here today, but the market's open because you've  
12 changed everything going forward. I mean, come on.

13 MR. TOPP: As to the accuracy of the  
14 wholesale data, that's been an issue that has been  
15 addressed repeatedly as a part of the OSS  
16 proceeding. We -- And it certainly does include  
17 performance that relates to the CLECs that are at  
18 issue in this case, and we have addressed that as a  
19 part of that proceeding. I think that -- Having  
20 said that, I think it's critical you know, we act  
21 within a statutory framework, and that is the  
22 Telecommunications Act of 1996. And we've got to  
23 give that an opportunity to work. And we think that  
24 the types of controls that we are talking about  
25 here, along with the other component pieces that we

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1 have talked about at length, will give that an  
 2 opportunity to work.  
 3 CHAIR SCOTT: Is Qwest concluding then?  
 4 MR TOPP: We are.  
 5 CHAIR SCOTT: All right. Any other final  
 6 questions for Qwest? We can always come back.  
 7 All right. Who would like to go next  
 8 then? Who knows the song Everything Is Beautiful?  
 9 Anybody in the room know the song Everything Is  
 10 Beautiful? Mr. Stanick does. Who put it in the  
 11 AT&T brief? Mr. Witt? There is none so blind as he  
 12 who will not see. That's a line from the song  
 13 Everything is Beautiful. We sang it at my sixth  
 14 made graduation. I read that and went, holy crap,  
 15 that's a great line.  
 16 MR. WITT Well, frankly, Your Honor --  
 17 CHAIR SCOTT Use your microphone,  
 18 please  
 19 MR. WITT: Frankly, Mr. Chairman I  
 20 didn't know it came from that song.  
 21 CHAIR SCOTT: I believe it did.  
 22 MR WITT: I thought that it came from  
 23 the Bible, but I think everything comes from the  
 24 Bible.  
 25 CHAIR SCOTT: You were trying to be

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1 guidance on the question, relies on the language of  
 2 the statute. In essence, the FCC's decision in this  
 3 matter can be summed up in three words: Read the  
 4 statute.  
 5 Every independent part: who has taken the  
 6 time to look at the question. With the sole  
 7 exception of Qwest, has arrived at the same  
 8 conclusion. Each may have used words that are  
 9 slightly different, but the final analysis is  
 10 exactly the same. Now, this is important for two  
 11 reasons. First, it establishes that the standard  
 12 for filing is clear and always has been clear. And,  
 13 secondly, it establishes that Qwest's defense in  
 14 this matter is fabricated and intended not to  
 15 elucidate or shed light on the issue, but rather to  
 16 manufacture confusion.  
 17 Qwest's petition for declaratory ruling  
 18 before the FCC was merely part of that strategy and  
 19 was clearly intended to delay matters and obscure  
 20 the issues. The FCC has now thoroughly rebuked  
 21 Qwest and its position and has established what  
 22 actually clear all along; that this commission has  
 23 jurisdiction over the filing and approval process  
 24 and that the standard for determining which  
 25 agreements must be filed is clear and always has

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1 biblical. You ended up being pop. Nice try.  
 2 MR. WITT: It's okay.  
 3 CHAIR SCOTT: Nice try. All right.  
 4 Mr. Witt, do you want to address the commission?  
 5 MR. WITT: I would be pleased to,  
 6 Mr. Chairman. And I would ask if you want the long  
 7 version or the short version because I have --  
 8 CHAIR SCOTT: I could show you the stack  
 9 of paper --  
 10 MR. WITT: Yeah.  
 11 CHAIR SCOTT: -- that this commission has  
 12 gone through, and I would hope you would have your  
 13 answer.  
 14 MR. WITT: Okay. In that case the short  
 15 version. First and foremost it is clear that the  
 16 standard for determining which agreement should be  
 17 filed and made subject to the approval and pick and  
 18 choose provisions of the federal act is derived  
 19 directly from the language of the statute itself.  
 20 The ALJ's enunciation of that standard is based on  
 21 the statute. The Iowa Board's iteration of that  
 22 standard is likewise derived directly from the  
 23 statute. The expression of that statute by the  
 24 Department of Commerce comes from a close reading of  
 25 the same statute. And the FCC. in giving its

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1 been clear. And by the way, Verizon, SBC, and Bell  
 2 South evidently don't have the same difficulty  
 3 reading the statute and complying with the statute  
 4 that Qwest apparently does.  
 5 Now, using that standard the ALJ has  
 6 determined that Qwest repeatedly violated the  
 7 statute and that these violations were intentional  
 8 and that penalties are appropriate. The evidence in  
 9 the record thoroughly supports all three of these  
 10 conclusions. The fact that the standard was clear  
 11 all along bolsters the conclusion that Qwest's  
 12 conduct was not willful and intentional. Qwest went out of its way to violate  
 13 the statute and keep the agreements out of the  
 14 public eye. Qwest then resorted to elaborate means  
 15 to construct a defense which ultimately could not  
 16 withstand even the briefest scrutiny from an outside  
 17 party, including the Department of Commerce, the  
 18 Iowa Board, the Arizona Corporation Commission, and  
 19 the FCC itself. So you have a clear standard of  
 20 willful violation and a fabricated defense.  
 21 Now, the benefits that Qwest derived and  
 22 hoped to further derive from its actions are also  
 23 clear: a handicapping of certain competitors, such  
 24 as AT&T; a silencing of other competitors, such as  
 25

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1 Eschelon and McLeod; thus facilitating Qwest's entry  
2 into the long-distance market while circumventing  
3 the requirement that its own local market first be  
4 truly opened.

5 Now, in this context the damage done to  
6 competitors is also clear. It's as clear as the  
7 benefits to Qwestare. And in the interest of time  
8 I'll focus on just one or two examples relating only  
9 to AT&T. The clearest and most egregious of these  
10 examples comes by examining Qwest's treatment of  
11 Eschelon beginning in the year 2000 to 2002 time  
12 frame and comparing that to Qwest's treatment of  
13 AT&T during the same period.

14 In November 2000 Qwest entered into its  
15 consulting agreement with Eschelon. According to  
16 the language of that agreement Qwest was to pay  
17 Eschelon for consulting and network-related services  
18 relating to wholesale service quality for local  
19 exchange service. The payment for these services  
20 is, in a word, astonishing. It amounts to a 10  
21 percent -- it's an amount equal to 10 percent of all  
22 purchases by Eschelon from Qwest. So Eschelon  
23 begins its consulting role and receives what amounts  
24 to a 10 percent discount on all of its purchases.  
25 The relationship begins in early 2001, for all

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1 tens of millions of dollars if the same discount  
2 were applied across state lines as the Eschelon  
3 agreement provides.

4 COMMISSIONER JOHNSON: Qwest said you  
5 were too small a company.

6 MR. WITT: With -- Mr. Chairman.

7 Commissioner Johnson, with all due respect to Qwest,  
8 they're wrong. We believe that we would be able to  
9 qualify under just about any kind of quality --  
10 quantity discount, volume discount, however you want  
11 to phrase it. That's -- That's our position.

12 So not only is Qwest's discriminatory  
13 treatment egregious, but the resulting damages are  
14 huge and easily calculated, at least in this  
15 particular instance.

16 Let's take one other example, and that is  
17 the small CLEC agreement provided that Qwest would  
18 allow those CLECs to pick and choose any provisions  
19 available in negotiated agreements in states other  
20 than Minnesota and import those provisions into  
21 agreements effective here. Qwest's standard  
22 procedure at the time was to limit pick and choose  
23 to existing agreements in the same state and not  
24 allow this kind of import -- importation. AT&T  
25 would have benefited enormously from the ability to

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1 intents and purposes, and was slated to continue  
2 through 2005.

3 from September 012000 through May of  
4 2001, virtually this same time period, AT&T is  
5 repeatedly seeking cooperative testing of the UNE-P  
6 platform, operating platform with Qwest. But  
7 instead of welcoming such participation with open  
8 arms and a 10 percent discount on purchases, Qwest  
9 continually stalls and hinders AT&T's attempts to  
10 accomplish this testing. As this commission is well  
11 aware, AT&T was forced to litigate the matter, and  
12 the commission reached extensive findings of  
13 willful, intentional misconduct on Qwest's part. In  
14 other words, at exactly the same time Qwest was  
15 cooperating with Eschelon with regard to wholesale  
16 service quality for local exchange service and  
17 paying Eschelon, Qwest was also flatly refusing to  
18 provide AT&T with UNE testing under a preexisting  
19 contract, testing for which AT&T was to pay.

20 I can tell you also that AT&T would have  
21 leaped at the chance to obtain what is essentially a  
22 10 percent discount on all purchases from Qwest.  
23 Applying this discount to AT&T's purchases in  
24 Minnesota alone would have resulted in savings of  
25 millions of dollars for AT&T and its customers and

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1 opt into agreements from other states.

2 CHAIR SCOTT: And that agreement got  
3 filed with every provision except the one you just  
4 said.

5 MR. WITT: Yes, Your Honor.

6 CHAIR SCOTT: Yeah.

7 MR. WITT: That's correct. Moving along.  
8 I'll skip the other -- the other examples. I  
9 could -- I could go on and do this with each and  
10 every one of the agreements. The ALJ has prepared  
11 such an analysis in his report. And, again, Qwest  
12 has clearly engaged in a pattern of anticompetitive,  
13 discriminatory conduct intended to hinder certain  
14 competitors and silence others.

15 Furthermore, Qwest's efforts to eliminate  
16 this discrimination going forward have been, in our  
17 opinion, illusory. Nowhere in Qwest's proposal for  
18 corrective action is there any suggestion of  
19 independent oversight, audits, or reporting  
20 requirements, although we understand now from what  
21 Mr. Topp and Mr. Spivack have said today that they  
22 would have no objection to that or at least that's  
23 my hearing of what they've said. But they never  
24 suggested it in the first place. Qwest claims to  
25

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1 first place. but it's proposed fix amounts to an  
2 unsupervised promise never to do it again. In view  
3 of the depth and breadth of Qwest's efforts to  
4 foment discrimination, Qwest's promises to stop it  
5 now are empty.

6 Now, the remainder of my remarks rally  
7 go to the penalty phase. And so I -- I will forego  
8 those, other than to think in terms of the ninth one  
9 here. Under the statutes, and the section is  
10 Minnesota Statute Section 237.462, and this would be  
11 subdivision 9 where it speaks in terms of other  
12 factors that justice may require. In this regard  
13 AT&T would ask this commission to look at the  
14 quality of Qwest's excuse here. It's a flimsy one  
15 to be sure.

16 Qwest staunchly claimed that the standard  
17 for determining which agreements to file was  
18 nonexistent, despite being told by the Iowa Board.  
19 the ALJ here, and even the FCC that the standard is  
20 clear. Qwest continues to maintain that the  
21 standard is not just unclear, it's absent. This is  
22 an excuse that never should have been raised and  
23 that wouldn't have been raised if Qwest were truly  
24 operating in good faith. Qwest's excuse here, in  
25 fact, is a reflection of the continued bad faith

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1 which permeates Qwest's behavior throughout, and  
2 this commission should not allow such behavior to  
3 persist.

4 AT&T, for the reasons stated here and in  
5 its briefs and testimony, respectfully asks that  
6 this commission accept the ALJ's report in its  
7 entirety and without modification and to impose upon  
8 Qwest the maximum penalties allowable under law.

9 And at this time I would be pleased to  
10 respond to any questions you may have.

11 CHAIR SCOTT: All right. Thank you,  
12 Mr. Witt.

13 Questions at this point?

14 Commissioner Reha.

15 COMMISSIONER REHA: Yeah, I -- just a  
16 question. I would like you to comment, if you  
17 could, on just the general sense in the hearing  
18 transcript and testimony in evidence that was  
19 submitted of evidence of discrimination versus the  
20 per se discrimination argument. Because you -- you  
21 just went into detail on how the impact was  
22 discriminatory against AT&T, and I'm just wondering  
23 if that was in the record and whether there was  
24 other types of evidence in the record.

25 MR. WITT: Mr. Chairman, Commissioner

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1 Reha, I believe -- first of all, yes, I believe that  
2 the record is replete with different instances of  
3 discrimination, concrete instances of  
4 discrimination. One of the things that, in fact, I  
5 am concerned with is the fact that there should be  
6 full disclosure of what the terms and conditions of  
7 each of these agreements might be. In other words,  
8 it's very difficult for any CLEC to opt into an  
9 agreement when that CLEC doesn't have all of the  
10 available facts at its disposal. And one example of  
11 this might be having a team on site from Qwest to  
12 assist in interconnection difficulties, servicing,  
13 ordering, things like that. If you don't know the  
14 costs that are involved in something like that, if  
15 you don't know the expertise that a particular team  
16 might be able to bring, then the idea, frankly, of  
17 having a bunch of Qwest employees wandering around  
18 your facilities is very disconcerting. I don't -- I  
19 think that that's -- there is some apprehension that  
20 would be associated with something like that unless  
21 you're able to determine exactly what their role  
22 might be. And there's -- the filing that  
23 Mr. Spivack spoke about does nothing to provide the  
24 depth of information that would be required to make  
25 that kind of a decision even initially to begin

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1 negotiations on some -- on an issue such as that.  
2 So that's one aspect of this.

3 Now, the other aspect is the notion that  
4 when you have established discounts for volume users  
5 and excluded certain users whose volume does extend  
6 to the appropriate levels, that is discrimination,  
7 and it does hinder not only the individual  
8 competitor, but competition generally. And so the  
9 instances of discrimination are very concrete, very  
10 tangible, and they are all documented on the record,  
11 I believe.

12 COMMISSIONER KOPPENDRAYER: Mr. Witt, are  
13 you suggesting that -- that the act provides for  
14 further disclosure beyond the filing of the complete  
15 interconnection agreements? When you ask for full  
16 disclosure, you're asking for something more than  
17 what the act calls for?

18 MR. WITT: Mr. Chairman, Commissioner  
19 Koppendray, no, the answer is that is absolutely  
20 not. I'm not asking for anything more than what the  
21 federal act would require, and that would be the  
22 actual agreement that's been -- that's been  
23 negotiated --

24 COMMISSIONER KOPPENDRAYER: Right.  
25 MR. WITT: -- between the two companies.

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1 So full disclosure would, in my mind anyway, extend  
 2 to what's in the agreement and no --  
 3 COMMISSIONER KOPPENDRAYER: It doesn't -  
 4 MR. WITT: -- and no further.  
 5 COMMISSIONER KOPPENDRAYER: It doesn't  
 6 require that somebody from Qwest explain the words  
 7 to you?  
 8 MR. WITT: Oh, certainly not. Although  
 9 if, in fact, it were something that were available  
 10 on a fairly widespread basis, then it seem obvious  
 11 to us that if we wanted to opt into something like  
 12 that, we would have someone over at Qwest who would  
 13 be able to answer further questions. But even to  
 14 make that kind of a phone call and to make an  
 15 inquiry, you have to kind of understand what the  
 16 terms and conditions of that would be.  
 17 CHAIR SCOTT: Any other questions far  
 18 Mr. Witt?  
 19 Let me just ask Mr. Witt, I think before  
 20 we move on -- Is there anyone in the room today from  
 21 Eschelon?  
 22 MR. WITT: Not that I'm aware of  
 23 CHAIR SCOTT: There's a couple of folks  
 24 back there who raised their hands.  
 25 From AT&T's perspective, the conduct of

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1 Eschelon, what are your comments on it?  
 2 MR. WITT: That's -- It's a difficult  
 3 question  
 4 CHAIR SCOTT: I'm looking specifically at  
 5 paragraphs 94, 128, and 367. 94, 128, and 367.  
 6 MR. WITT: Without -- Mr. Chairman.  
 7 without regard -- without revealing any bade secret  
 8 informarim. this -- I have problems with the  
 9 contents of paragraph 94. I believe that there are  
 10 some -- some difficulties there. And I can  
 11 certainly -- I can certainly understand a CLEC being  
 12 in a position where it's -- it's really up against a  
 13 wall and faced with a decision as to how to best  
 14 deal with on the one hand a monopoly provider and an  
 15 the other hand competition from other CLECs as well.  
 16 This doesn't seem to me to be an appropriate answer,  
 17 this kind of behavior. I can't sanction it. I  
 18 don't -- I don't know all of the details that are  
 19 involved in that, but it certainly does disturb me  
 20 and --  
 21 CHAIR SCOTT: You think this commission  
 22 should open an investigation into the conduct of  
 23 some of the CLECs involved here?  
 24 MR. WITT: AT&T would not take a position  
 25 On that particular issue. We believe that -- that

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1 if -- if you decide to do that, certainly it is well  
 2 within your authority. And I would prefer to remain  
 3 neutral on that --  
 4 CHAIR SCOTT All right.  
 5 MR. WITT: -- particular --  
 6 CHAIR SCOTT Fair enough.  
 7 MR. WITT: -- issue.  
 8 CHAIR SCOTT: Fair enough.  
 9 All right. Let's move on.  
 10 MS. Lehr, did you want to go next?  
 11 MS. LEHR: Yes. I have just a few  
 12 comments to follow up on Mr. Win's comments. I  
 13 guess the most important thing I would -- that I  
 14 wanted to convey to the commission today is the idea  
 15 that, you know, this isn't some sort of on paper  
 16 discrimination, something that's about Qwest but  
 17 doesn't truly have an impact on other companies.  
 18 MCI has entered the market in Minnesota and  
 19 thinks -- and all the other 14 states and has dooe  
 20 so very aggressively. So with respect to some of  
 21 the specific agreements -- or specific terms that  
 22 were contained in these agreements, I wanted to  
 23 touch on the discount. And a couple -- A few of the  
 24 issues that we have or that I would want to point  
 25 out is it's really impossible to quantify how many

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1 CLECs would have entered the market or entered  
 2 different areas of the market if they had had the  
 3 10 percent discount. I mean, in -- There are some  
 4 areas of the market that are not profitable where a  
 5 CLEC can't make a profit. But if you factor in --  
 6 you know, if the 10 percent discount, which is a  
 7 fairly big discount when you're looking at the  
 8 margins, you know, that are available under the  
 9 rates we have, would have nerved other arms or  
 10 would have come into the market had they had that  
 11 same opportunity.  
 12 And I think, you know, even beyond that  
 13 the effect of the 10 percent discount was that it  
 14 put money directly into other CLECs' pockets that,  
 15 you know, other CLECs weren't -- you know, didn't  
 16 have. I mean, it put money into Eschelon's pockets.  
 17 It put money into McLeod's pocket. And with, you  
 18 know, a struggling industry, you know, that's  
 19 important. And, you know, it really affects the  
 20 competitive market that we have in Minnesota  
 21 The other issue that I wanted to talk  
 22 about was the service agreements. And I understand  
 23 that Qwest is stating that these on-site  
 24 provisioning teams were -- that notion was filed in  
 25 an interconnection agreement. My understanding is



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1 that it wasn't actually filed until there was some  
2 department intervention. And at that point -- It  
3 was filed in 2001. Jhar agreement, the agreements  
4 had been going on for some time at that point. But  
5 I think the red issue with that is the type of  
6 service that other CLECs were able to offer their  
7 customers. I mean, there is no way to quantify how  
8 many customers M U lost or other CLECs lost or -- 10  
9 McLeod or Eschelon or to the other CLECs in these  
10 special agreements or how many customers Qwest wo  
11 back because out service problems weren't fixed at  
12 the same -- you know, with the same detail or in the  
13 same time frame as some of these other parties had  
14 their service problems fixed.

15 CHAIR SCOTT: Paragraph 142 actually  
16 supports your -- what you're saying. It's a finding  
17 about Sarah Padula of POPP Communications who sa  
18 that POPP was losing customers to Qwest and Eschelon  
19 and couldn't figure out why. And, of course, then  
20 it turns out that it became clear why.

21 MS. LEHR: And on that note I believe if  
22 you called up different CLECs and attempted to order  
23 service, even though Qwest is required to provide  
24 service within a few days, I think you would find  
25 the people -- the companies are having to say, Well,

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1 your service will be switched in a month, because we  
2 can't count on having -- you know, having the  
3 service up and running. And, you know, as we've  
4 discussed in other cases, that becomes a reflection  
5 on our company, not on -- The customer doesn't  
6 understand, you know, that it's not necessarily our  
7 issue that is not being handled.

8 And I guess the only other comment that I  
9 wanted to make was -- is our concern about the  
10 possibility of oral agreements existing beyond those  
11 that were filed, you know, in this case, and oral  
12 agreements that may still exist today. I wasn't at  
13 the ROC personally, but I've been told that on one  
14 of the panels Qwest did tacitly admit that there  
15 were oral agreements that had been entered into  
16 between the parties.

17 And, for example, I just want to discuss  
18 our concern, you know, is based on some specific  
19 understanding of some examples of what these oral  
20 agreements are. Our understanding is that there are  
21 some agreements that -- we've heard that there are  
22 agreements where a party won't open a trouble  
23 ticket; that they'll just try and work it out  
24 between, you know, the CLEC technician and the Qwest  
25 technician. And that affects us in two ways. First

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1 of all, that if a trouble ticket isn't opened, that  
2 data is not being reported as part of Qwest's  
3 performance measures. And, B, it's another example  
4 of where another company's customer is faking --  
5 being taken care of at the expense of other  
6 companies' customers. And these are -- These are  
7 real problems, and they have a real affect on the  
8 competitive landscape in Minnesota.

9 I have a couple other comments, but they  
10 also relate to more of this penalty phase.

11 CHAIR SCOTT: All right. Thank you.

12 Questions?

13 COMMISSIONER KOPPENDRAYER: Yeah.

14 CHAIR SCOTT: Commissioner Koppendraye.

15 COMMISSIONER KOPPENDRAYER: Mr. Chair.

16 Ms. Lehr, you, without quantifying in detail, talk  
17 about the -- the potential damage to your company in  
18 both being unable to compete and perhaps loss of  
19 customers that you have as a result of actions of  
20 Eschelon and McLeod because, in fact, it takes two  
21 to make an agreement. Given that your company was  
22 harmed, allegedly intentionally, by actions of  
23 people from McLeod and Eschelon, what remedies  
24 should be used in the penalty phase to right the  
25 wrongs that you experienced because of their

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1 actions, not just Qwest?

2 MS. LMR: Chair Scott, Commissioner  
3 Koppendraye, I think that the problem with that  
4 question is -- or the difficulty with that question  
5 is that we don't -- even though we would not -- we  
6 don't condone the behavior of other CLECs entering  
7 into these types of agreements because every time  
8 they get a customer, you know, based on a special --  
9 special clause or special agreement, that's a  
10 customer that is potentially taken away from MCI or  
11 AT&T if the customer was searching to go to someone  
12 other than Qwest. But I think in terms of remedying  
13 our damages, those are really only things that Qwest  
14 has the power to provide. For example, the  
15 10 percent discount. If you look -- If you took the  
16 period of time in which Eschelon and McLeod received  
17 that discount and -- and Qwest was required to  
18 provide us with the monetary damages, you know,  
19 during that period of time -- because it's not just  
20 the money we didn't get; it's because we didn't get  
21 the money, we couldn't enter this area or we didn't  
22 have the same ability to capture customers. So --

23 COMMISSIONER KOPPENDRAYER: So, in short  
24 the only bad guy is Qwest?

25 MS. LEHR: No, I -- Chair Scott,

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1 Commissioner Koppendray, I'm not -- I'm not saying  
2 that. I'm not saying the only person with  
3 unclean -- or party with unclean hands is Qwest.  
4 But the problem is is the party in which we would  
5 need to seek remedy from the -- would have to be  
6 Qwest because we don't -- we don't use Eschelon's  
7 services; we use Qwest's services. So if we want  
8 improved customer service or we want a refund, you  
9 know, Qwest is the provider, not Eschelon and  
10 McLeod. I mean, they gave the discount. They put  
11 the money in other CLECs' pockets.

12 So I don't -- You know, if their -- If  
13 the commission were to determine that, you know,  
14 they needed to open additional investigation, I  
15 think that it would be as part of that type of  
16 investigation that the commission would want to  
17 consider what type of remedies might come from other  
18 CLECs. It's difficult to -- It's difficult to  
19 answer the question.

20 COMMISSIONER JOHNSON: Mr. Chair.

21 CHAIR SCOTT: Yeah. Commissioner Johnson.

22 COMMISSIONER JOHNSON: Commissioners. I  
23 was just sitting here thinking about the companies  
24 and the hours that we've spent here over the past  
25 years. And today we hear from the larger companies

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1 still out there trying to make for customers and  
2 to redly rake -- And that amount is incredibly  
3 meaningful, and the lack of it is just as damaging  
4 on us as it is on my other company regardless of  
5 size

6 Thank you

7 COMMISSIONER JOHNSON: Well, I -- It's  
8 difficult. But think of the small ones; it's redly  
9 tough.

10 CHAIR SCOTT: Let's go to Mr. Alpert.

11 MR. ALPERT: Chair Scott, Commissioners,  
12 Steve Alpert for the Department of Commerce. I'm  
13 going to keep my opening comments brief; and then I  
14 would go through and try to address each of the  
15 points that were raised by Qwest, if you would like  
16 me to.

17 If you ignore the evidence, it's easy to  
18 see it Qwest's way. Judge Klein found that Qwest  
19 had engaged in a series of anticompetitive actions,  
20 that Qwest knowingly and intentionally violated the  
21 telecom act, that Qwest gained and competition low  
22 as a result. He has recommended penalties be  
23 assessed and has recognized that monetary penalties  
24 done will not remedy the situation. The record  
25 fully supports his findings in this matter. Qwest

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1 But I'm thinking of the smaller ones, the smaller  
2 companies that have been on resale and have come  
3 here and pleaded for various things, and especially  
4 if they could have received a 10 percent discount  
5 over and above what they did have. And these folks  
6 aren't here today, I notice. They --

7 CHAIR SCOTT: Oh --

8 COMMISSIONER JOHNSON: -- don't have --

9 CHAIR SCOTT: -- some of them are.

10 COMMISSIONER JOHNSON: -- the money to --  
11 Well, they're here. There, I recognize the face.  
12 Especially you. And they don't have the money to be  
13 involved in this party. But it -- It's a life and  
14 death situation for them. And 10 percent is a large  
15 number.

16 CHAIR SCOTT: Yep.

17 MS. LEHR: Chair Eon.

18 CHAIR SCOTT: Yeah.

19 MS. LEHR: If I could just respond to  
20 Commissioner Marsh -- or Johnson's comments. I just  
21 wanted to note that I know that we are, you know,  
22 considered a bigger company; but the -- you know,  
23 the 10 percent discount, if you look at our company,  
24 we're obviously -- I'm sure everybody's read the  
25 news -- I mean, we're struggling too, yet we're

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1 has once again been shown to have placed its 271  
2 retail initiative ahead of its 251,252 wholesale  
3 obligations. It has repeatedly violated its  
4 wholesale obligations, specifically to achieve those  
5 271 goals.

6 Qwest still doesn't get it. It continues  
7 to deny today even the most minor of unlawful  
8 conduct, despite the evidence overwhelmingly to the  
9 contrary. As the chair pointed out, it has been  
10 established through this docket and through the  
11 UNE-P docket that since Qwest started doing business  
12 in Minnesota in July of 2000 and even while they  
13 were trying to get into business in Minnesota in  
14 2000, it has purposefully engaged in a continuous  
15 and ongoing pattern of anticompetitive behavior  
16 intended to subvert the very heart of the act, of  
17 the laws of Minnesota, and of the authority of this  
18 commission

19 As Judge Klein pointed out, money done  
20 will not correct the problem. Money done, not even  
21 \$195 million, will change this company's attitude or  
22 its conduct. It will help, but \$195 million pales  
23 in comparison to what Qwest sees as its brass ring.  
24 And that's one to two billion dollars per year in  
25 additional revenues.

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1 We ask this commission to adopt the  
2 extensive and well-reasoned report of the ALJ and  
3 move on to the business of trying to get this  
4 company to understand this type of unlawful and  
5 anticompetitive behavior will not be tolerated nor  
6 will it be rewarded.

7 Moving on to some of the points that  
8 Mr. Spivack raised. And he started out talking  
9 about the FCC decision and talking about what  
10 they've done now in the future, which some of this  
11 is not in the record; it's new information to us as  
12 well. And he puts it in the context of all of this  
13 was in the past; here's what we're going to do in  
14 the future. Well, I submit to you that past  
15 behavior is the best indicator of future behavior.  
16 And we've seen a lot of this past behavior. So I  
17 would respectfully request the commission keep that  
18 in mind when looking at what Qwest is proposing for  
19 the future.

20 They talk about putting new people in  
21 place; that Ms. McKenney is no longer around. We  
22 heard that Mr. Nacchio is no longer around, and then  
23 we heard that Mr. Nacchio is back with some type of  
24 consulting agreement. Mr. Davis is still there as  
25 far as I'm aware.

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1 They've indicated that they've now  
2 provided these agreements to the commission. Well,  
3 in response to our complaint, they provisionally  
4 filed these agreements. They terminated many,  
5 including the agreements with the 10 percent  
6 discount. Nobody told them to terminate the  
7 agreements; we asked them to file the agreements.  
8 Nor only did they not just terminate them, they paid  
9 large amounts of money along with those  
10 terminations, which begs the question once again  
11 about what was in those agreements and how valuable  
12 they were and how expensive it would be to Qwest to  
13 actually comply with the law and to do things right.

14 They've indicated that they've filed all  
15 new agreements. Well, it's also interesting to note  
16 that what they told the FCC was that they were  
17 filing new agreements in their other -- all  
18 throughout their region, but they specifically  
19 exempted out any terminated agreements. So we don't  
20 know how many terminated agreements in these other  
21 states they've also not disclosed, and they're not  
22 available for pick and choose. And as was pointed  
23 out, the small CLEC agreement would have given all  
24 of the CLECs in Minnesota the ability to opt into  
25 all of those agreements, all the secret agreements

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1 in other states.

2 Interestingly enough, they filed these  
3 other agreements. The ones that they didn't  
4 terminate, in all of the states that they filed 271  
5 approval. Those are available for pick and choose.  
6 In Minnesota they're still not. They're still  
7 sitting there. Yes, CLECs can look at them. Yes,  
8 the CLECs can drool, maybe. They took a lot of meat  
9 out of what was there. But they're still not  
10 available. They filed -- They formed a new  
11 committee.

12 COMMISSIONER JOHNSON: What do you mean  
13 they're not available?

14 MR. ALPERT: Well, they're not available  
15 under pick and choose because they haven't been  
16 formally approved by this commission under the act.  
17 They were provisionally or conditionally submitted  
18 to this commission. It's the, yeah we'll file them  
19 if you tell us we have to type of position. Plus  
20 they've terminated a number of them. And I'm sure  
21 that will be discussed in the second phase in terms  
22 of, you know, what do you do about the terminated  
23 agreements. There's been some suggestion here  
24 already.

25 They filed -- They formed a new committee

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1 to take care of things. And if you look at the  
2 testimony, the only testimony in the record is that  
3 of Mr. Brotherson. And if you look at his  
4 testimony, he wasn't sure what the old procedure  
5 was, and he's not sure what the new procedure is.  
6 One thing he is kind of sure about is that the same  
7 people that were involved in making the decisions in  
8 the past are the same people that are making the  
9 decisions in the future, including, of all people,  
10 Mr. Davis and the law and policy group.

11 Everything --

12 CHAIR SCOTT: Is that where this strategy  
13 for this docket came out of? Come out of Denver?

14 MR. SPIVACK: Chair Scott, by strategy do  
15 you mean the legal positions that Qwest has taken?

16 CHAIR SCOTT: Yeah.

17 MR. SPIVACK: Well, I mean, they've been  
18 developed by the outside counsel and inside counsel.

19 CHAIR SCOTT: And the inside counsel is  
20 located where?

21 MR. SPINACK: The inside counsel has been  
22 in the policy and law group.

23 CHAIR SCOTT: In?

24 MR. SPIVACK: In Denver.

25 CHAIR SCOTT: Yeah. All right.

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1 Mr. Alpert.  
 2 MR. ALPERT: Mr. Spivaek argues that the  
 3 FCC never set out a definition before. But the FCC  
 4 has acknowledged the same thing that Judge Klein  
 5 found before the FCC m e out with its decision, as  
 6 the Iowa Utilities Board has decided; it flows from  
 7 the act. As pointed out in our briefs, Qwest itself  
 8 in its SCAT had defined what an interconnection  
 9 agreement was. There were prior decision of this  
 10 commission that --  
 11 CHAIR SCOTT: By the way, when did Qwest  
 12 do that? When did Qwest define interconnection in  
 13 the SGAT for the first time? That was a cookie  
 14 cutter SGAT; right? So.  
 15 MR. TOPP: We made the SGAT filing  
 16 initially in -- on October 1st, 2001.  
 17 CHAIR SCOTT: October 1st, 2001 in  
 18 Minnesota. When's the first time you filed it in  
 19 any state?  
 20 MR. TOPP: It would have been prior to  
 21 that. I -- I don't know the specific date.  
 22 CHAR SCOTT: How much prior? Quite a  
 23 bit prior.  
 24 MR. TOPP: That's -- I think that's  
 25 correct.

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1 point out the flex contract, petition for -- to get  
 2 relief from the tiling requirement. Qwest and  
 3 Empower (phonetic) had together gone to the FCC in  
 4 another docket, a petition for forbearance, what we  
 5 call the flex contract docket-- and we've pointed  
 6 out the cite to that in our briefing -- and there  
 7 they went to argue to the FCC that there should be e  
 8 forbearance of the normal pick and choose  
 9 requirements; *that* companies like to enter into or  
 10 need to enter into business-to-business  
 11 relationships, and the pick and choose rule is  
 12 somehow constraining. And our position has always  
 13 been that you don't ask for forbearance from a rule  
 14 unless you know there is a rule out there that  
 15 precludes you from doing what it is you want to do.  
 16 And what is exactly -- what they've exactly done in  
 17 this case, as we've shown, is all of these flex  
 18 contracts. Qwest has determined these are  
 19 business-to-business contracts giving flexibility,  
 20 and they don't think they should be filed. But  
 21 instead of waiting for the FCC to decide this, going  
 22 to the FCC and asking them, they did it. And as  
 23 they were being caught, they went in and now they're  
 24 asking for the FCC to say, oh, it was okay.  
 25 *Level of detail.* Basically what Qwest

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1 CHAIR SCOTT: Year and a half prior,  
 2 maybe?  
 3 MR. TOPP: Right. Whether it included  
 4 that provision or not, I --  
 5 CHAIR SCOTT: Let's bet.  
 6 MR. TOPP: .. I can't say.  
 7 CHAIR SCOTT: Let's bet. You want to  
 8 bet?  
 9 MR. TOPP: I'm not going to bet.  
 10 CHAIRSCOTT: Qwest was able to define  
 11 interconnection in its SGAT well in advance or  
 12 getting this advice that it supposedly needed from  
 13 the FCC. And if Qwest had applied its own SCAT  
 14 definition to what we have in front of us, they'd  
 15 have been filed; right? I mean, that's about as  
 16 simple as life gets. And it sure blows away the,  
 17 oh, my god, we're so confused argument. All you had  
 18 to do is follow your own SGAT definition.  
 19 Mr. Alpert.  
 20 MR. ALPERT: Thank you. Chair Scott,  
 21 Commission. Prior decisions of this commission on  
 22 certain -- certain issues certainly laid to rest any  
 23 possible confusion, if there could have been any  
 24 possible confusion. And I think that one thing that  
 25 we had pointed out that I believe the ALJ did not

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1 has been saying all along is, We can say something  
 2 as general as we will follow the *act*, and that's  
 3 good enough. When you talk about amendment 8, the  
 4 amendment that talks about the team that -- the  
 5 on-site teams that will -- that will come out, those  
 6 are very, very general provisions. The meat is in  
 7 these secret agreements. And as has been alluded to  
 8 by the others at this table, unless you see some  
 9 detail there, you don't really *know whether* it's  
 10 worth exploring. You know, just having an on-site  
 11 provisioning team you don't know what it costs, you  
 12 don't know what it entails. But the derail was in  
 13 the agreement with Eschelon. The derail was there,  
 14 and they decided not to file that. If you take  
 15 their argument to its logical extension, they would  
 16 never have to file anything with you because they've  
 17 got something general out there. And the ALJ  
 18 recognized that and specifically rejected that.  
 19 That gets to the same service; well, we  
 20 gave everyone the same service. Now, setting aside  
 21 the fact that apparently you defrauded these CLÉCs  
 22 when you told them you could do something special  
 23 for them when you entered into these agreements,  
 24 apparently now you're saying you can't do anything  
 25 special for them. So everyone is treated the same.

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1 But that begs the question, because the CLEC who  
 2 entered into an agreement to get something special  
 3 also got the remedying that goes with it; the  
 4 enforceable agreement to come in and say, well,  
 5 you're not doing it; you may be giving me the same  
 6 as Joe company, but it isn't good enough; we have an  
 7 agreement that you give me A plus, not just A; and  
 8 so we have a remedy. Whereas the other CLEC, I  
 9 guess they're stuck at looking at the website  
 10 everyday and trying to figure out today what are our  
 11 rights, what are our -- you know, what is Qwest  
 12 going to do for us today, as opposed to being able  
 13 to enter into an agreement, an enforceable  
 14 agreement, and move on with things like providing  
 15 service to customers in the state of Minnesota and  
 16 not having to fight about how they're going to be  
 17 able to do that.

18 The evidence shows that the only struggle  
 19 that was in Qwest's mind was how to violate the law  
 20 and how not to get caught.

21 I'm vying to skip through some of this  
 22 that others have addressed so that -- They talk  
 23 about the FCC's decision; that, again, all they have  
 24 to do is put a general statement on their website.  
 25 I don't think that's what the FCC said. Generally

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1 I apologize. I'm trying to follow each of the  
 2 points that Mr. Spivack made, and I'm having  
 3 difficulty understanding my notes at some point. I  
 4 think I coveted that.

5 They say there was no evidence as to the  
 6 knowledge that they had to make these filings and  
 7 that no witness ever testified. We have evidence  
 8 and there's an attorney from Eschelon. We have the  
 9 -- I think it might be in paragraph 94. But there's  
 10 an exhibit where we have correspondence from this  
 11 attorney from Eschelon back to Qwest saying, Are you  
 12 sure you want this language in here, words to that  
 13 effect; you know that that's going to require this  
 14 to be filed. At least that's the way it's been  
 15 interpreted. Boom, the language from Qwest comes  
 16 out of the agreement.

17 We have the small CLECs, as  
 18 commissioner -- or Chair Scott has alluded to,  
 19 filing two versions of the same document purporting  
 20 that this is their complete settlement from an  
 21 experienced company that knows how to put trade  
 22 secret or confidential or something in there, and  
 23 yet there's this second version out there that  
 24 contains the very provision that is of interest to  
 25 other CLECs and that is being able to opt into other

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1 available doesn't mean you put a general -- general  
 2 statement of what you're willing to do on your  
 3 website and make it available. Generally available  
 4 I think means if you have a specific agreement, you  
 5 make it generally available to everyone by putting  
 6 it on your website. And we don't have anything -- I  
 7 would state for the record, the evidence in this  
 8 case will establish that there's not one of the  
 9 provisions that we have complained about in this  
 10 case where Qwest did that. At most Qwest made some  
 11 of these documents -- they handed out some of these  
 12 documents to some CLECs. But none of these  
 13 provisions were ever generally available. So when  
 14 if you take that interpretation from the FCC that  
 15 that would somehow meet their requirements or they  
 16 can meet the requirements under the law for those  
 17 specific types of provisions in this specific type  
 18 of way, they never did it here. So it's a what-if  
 19 situation. It doesn't apply to my of the facts in  
 20 this particular case.

21 The FCC order does not address  
 22 discrimination other than to say they're against it.  
 23 And Qwest, I think, knew that as well.

24 The -- Qwest argues it goes to their lack  
 25 of intent; that -- that -- I'm trying -- I'm sorry.

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1 agreements. And it's not just the fact that --  
 2 There's some argument being made here that, well,  
 3 this was an agreement to do something in the future.  
 4 But as the A U I think pointed out, there's  
 5 something to be said for knowing what you're going  
 6 to be able to get in the future. You don't have to  
 7 waste your time and resources in trying to  
 8 accomplish that. I think the date in that contract  
 9 where this provision, this ability to opt in was  
 10 kind of tied into the AT&T interconnection agreement  
 11 going into evergreen status, which, as we all know  
 12 from other dockets, Qwest was taking the position  
 13 that none of those provisions would be available for  
 14 pick and choose. Well, what better situation to be  
 15 in for a -- especially for small companies than to  
 16 say, Okay, now do I have to wait for AT&T to  
 17 renegotiate this; we can't afford to do this; or can  
 18 I see what's available in one of 13 other states  
 19 where someone may have already negotiated this.  
 20 And we can opt into those. That gives them  
 21 additional options that were not available to anyone  
 22 else or that they didn't know might exist out here  
 23 that they could negotiate for themselves.

24 We have the -- Mr. Fisher's testimony  
 25 that he specifically asked that it be put in

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1 writing, and he was specifically told, no, others  
2 might want it; others might be interested in it.

3 CHAIR SCOTT: And that -- that puts  
4 McLeod in a different position, in my mind at least,  
5 than Eschelon, that -- that alone. Because I don't  
6 view McLeod as being quite as much of a  
7 coconspirator in the sneakiness as Eschelon at least  
8 on paper appears to have been. Do you think?

9 MR. ALPERT: Chair Scott, Commission, I'm  
10 not happy with either company. I mean, I understand  
11 what's been discussed here; and I'm sure the  
12 question will come up, well, then what do you do  
13 about it? And I guess my response right now is  
14 let's deal with the bank robber, and we'll deal with  
15 the getaway driver and the lookouts after this. But  
16 we've all been very busy this summer, and we're  
17 trying to deal with this right now. But -- And we  
18 appreciate the level of cooperation that we have  
19 received from those companies during this  
20 investigation. It doesn't, in my mind, completely  
21 forgive the conduct. It did take two. And you  
22 know, you may find at the end of the day that it was  
23 a gun to their head. But short of a gun to their  
24 head these people knew what Qwest's obligations  
25 were as well, and they knew that helping them do

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1 believe Chair Scott brought it up -- Let's see here.  
2 I'm trying to find it. It might be one twenty --

3 128 I believe you -- finding 128, referring to  
4 Exhibit 226, I believe. You've got that  
5 correspondence going back and forth.

6 You've got Ms. Padula and Mr. McMillin  
7 testifying they went to find out about this stuff;  
8 they couldn't even find out the basics. So when you  
9 talk about something being generally available, when  
10 you go and ask them, you can't -- you get a Oar  
11 out, We're not telling you; there's more specifics  
12 here; there's more detail here; we're not going to  
13 tell you.

14 You've got the division of contracts.  
15 And there's evidence in here that there were  
16 discussions going back saying, Well, you know, we  
17 should split this up into contract A and contract B  
18 because this one has a stronger likelihood of coming  
19 to light than this one. So that's the kind of  
20 struggling that Qwest went through in terms of their  
21 obligations under the act.

22 We get to the discussion of  
23 discrimination per se and that Qwest's position is  
24 the FCC requires an agreement-by-agreement  
25 determination that there was discrimination per se.

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1 that was not the right thing to do.

2 CHAIR SCOTT: Are you comfortable  
3 representing to the commission today that the  
4 department will take a look at the behavior of the  
5 CLECs involved here?

6 MR. ALPERT: I will confirm it, but I'm  
7 fairly comfortable. I'm getting the immediate  
8 nod --

9 CHAIR SCOTT: All right.

10 MR. ALPERT -- from my client that we  
11 will.

12 CHAIR SCOTT: All right. All right.

13 MR. ALPERT: We have Mr. Deanhardt and  
14 his testimony regarding his contacts with Mr. Kelley  
15 from then U S WEST regarding the Covad agreement and  
16 whether it should remain confidential or not. Keep  
17 in mind a couple of these agreements don't have  
18 confidentiality provisions. It was specifically  
19 agreed, at least by the CLEC, that it shouldn't be  
20 confidential; yet Qwest decided that they would make  
21 it such. And you noticed -- You remember the battle  
22 we had at the outset here as to what was going to be  
23 made public and what wasn't going to be made public  
24 despite the positions of the CLEC. We have the  
25 Eschelon letters, and we're talking about -- and I

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1 I don't? .. Again, I don't think the FCC specifically  
2 addressed that point.

3 Again, none of these provisions were  
4 generally available. At most some things were  
5 passed out or there was word of mouth or you had the  
6 publicly-filed amendments that had very little flesh  
7 on the bone. We're going to have a procedure; we're  
8 going to agree to a procedure. Well, they did and  
9 they did, but nobody found out any more detail. Why  
10 would anyone think that there was anything more out  
11 there? They would have expected it to be filed.

12 As Mr. Spivack said -- even admitted in  
13 his earlier comments, that, you know, they filed the  
14 agreements here. They're not available for pick and  
15 choose; but at least, you know, they can be used for  
16 negotiation. Well, that's -- that's part of the  
17 discrimination per se. They're not out there.  
18 People can't look at them, companies can't look at  
19 them, and they can't negotiate. If you don't know  
20 that Qwest is even offering discounts -- I mean, if  
21 you listen to Ms. Rixe or Ms. McKenney, We don't  
22 offer discounts. Well, why would you go ask for  
23 one? Ms. Rixe, can we get a discount? We don't  
24 offer one. Well, that's not true. And if they knew  
25 that these agreements were out there, even if they

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1 couldn't today qualify, at least they knew what the  
2 ground rules were.

3 And I guess the question that I might ask  
4 of McLeod is: If you knew that you could get this  
5 same volume discount of 10 percent by committing to  
6 \$150 million in purchases, why would you ever agree  
7 to \$450 million? Why would you -- Why would you  
8 suck your company's neck out for an extra 300  
9 million if you knew you could get it for 150? Well,  
10 they didn't know they could get it for 150 because  
11 it wasn't filed. In fact, there's correspondence  
12 in there -- I can't recall the exact exhibit --  
13 where they were not happy about the fact they  
14 couldn't get most favored nation treatment. They  
15 wanted the best of all worlds as well.

16 COMMISSIONER KOPPENDRAYER: You're not in  
17 foreign policy too, are you?

18 MR. ALPERT: So. Not today. Again, they  
19 claim there's no discrimination just because it was  
20 not available to opt in -- into for pick and choose,  
21 but we believe that that's not the case. As  
22 heard -- As you've heard today AT&T believes that it  
23 could have opted into it. There is testimony in the  
24 record of some of the discrimination against AT&T  
25 from AT&T's witness or the witness from AT&T.

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1 Again, McLeod may have been discriminated in this  
2 case because they could have opted in for \$150  
3 million in total purchases, not 450.

4 The McLeod agreement, by the way, doesn't  
5 even require UNE-Star, that you get UNE-Star to get  
6 the discount. The Eschelon agreement has a  
7 provision in there that talks about UNE-Star, but it  
8 doesn't specifically require it. But the McLeod one  
9 does not require that they get -- that they have to  
10 have UNE-Star in order to get a discount

11 But it boils back down to I think what  
12 Commissioner Johnson said, if you don't know about  
13 it, how are you ever going to try to meet the  
14 prerequisites? when asked they won't tell. And,  
15 again, Qwest went out of their way to disguise their  
16 deals. I mean, there's another factor. You take a  
17 look at these UNE-Star agreements. Now what's  
18 publicly filed makes it look like I believe it was  
19 Eschelon had to pay I believe it was \$10 million up  
20 front and there were -- you know, there was this  
21 \$150 million commitment over three years, and there  
22 was this so-called consulting agreement, etcetera.  
23 But what was not publicly filed was that they got a  
24 \$10 million payment back to them. It cost them  
25 essentially zero. If you factor in that if other

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1 companies had known what the true up-front costs  
2 were and if the other companies knew about the 10  
3 percent discount not just for the UNE-P lines, but  
4 across the board and across not even Qwest's region  
5 but out of region, if they had known about these  
6 things, there's got to be some companies out there  
7 that would have inquired further, would have  
8 negotiated further. Companies may have joined  
9 together in order to be able to come up with their  
10 volume discounts. We don't know. Why? Many of  
11 these companies are no longer around, and Qwest  
12 never made it public.

13 A lot has changed in the last two years  
14 on the financial situation of these companies and  
15 their ability to do things. Two years ago money was  
16 flowing. These companies may very well have been  
17 able to get into this market. But Qwest decided to  
18 choose who they wanted to do business with and under  
19 what conditions.

20 We don't think there has to be need of  
21 actual suffering to be proven in this particular  
22 case. Qwest is confusing harm and discrimination.  
23 Again, knowing that you have an enforceable right  
24 versus looking up your rights everyday on the web is  
25 worth quite a bit

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1 As Mr. Witt point out, other state  
2 commissions aren't confused nor are other RBOCs,  
3 ILECs, or any other company. If you take a look at  
4 the comments that were filed in that docket, and  
5 we -- that's in our -- it's in our brief pointing  
6 out this docket, the FCC docket on declaratory  
7 judgment, Qwest was alone in its position. And  
8 they're alone in their position today after the FCC  
9 and Judge Klein has issued its findings.

10 Once again, I would point out that  
11 everything seems to flow through the law and policy  
12 group. Whether it's retail, whether it's wholesale,  
13 it all flows up into one group where the decision  
14 making seems to come out of. And we just don't see  
15 any change there. Ms. McKenney may not be here. I  
16 have no idea where she is, whether she's with an  
17 affiliate, whether she's going to be back tomorrow.

18 CHAIR SCOTT: I'd like some thoughts this  
19 afternoon on what to do about that

20 MR. ALPERT: About Ms. --

21 CHAIR SCOTT: The flow. The flow of  
22 information.

23 MR. ALPERT: I think that that addresses  
24 the comments that Mr. Spivack was making, and I  
25 would be happy to answer any questions that the

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1 commission has.

2 CHAIR SCOTT: Questions of Mr. Alpert,  
3 and then we'll go to Mr. Marker.

4 COMMISSIONER KOPPENDRAYER: 1--

5 CHAIR SCOTT: Commissioner Koppendraye.

6 COMMISSIONER KOPPENDRAYER: Commission

7 Scott. Mr. Alpert, while you were talking I made  
8 some notes; and then I'd change my mind, and I'd  
9 make a different note. But what occurs to me  
10 sitting here this morning is how, when you look  
11 around the room, people have gone from company to  
12 company and from -- from your department and from  
13 our department to company and around and around.

14 And if you were one who had gotten hired by Qwest in  
15 this circle that goes around, would you feel this  
16 morning that you were really being piled on?

17 MR. ALPERT: (Breathing noise.)

18 That's -- That's how I would feel if I -- if I went  
19 to work for this company. I don't think -- If it's  
20 piling on, it's legitimate piling on.

21 COMMISSIONER REHA: Was that supposed to  
22 be Darth Vader?

23 MR. ALPERT: That's -- That's what that  
24 was supposed to be.

25 COMMISSIONER KOPPENDRAYER: I don't watch

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1 never been my experience here that you or Ms. Pritt  
2 (sic) have ever had to sit back and feel like you  
3 took second fiddle, so to speak. You work just as  
4 diligently and just as hard and present your case  
5 just as adequately as anyone else. So -- And I  
6 compliment you for -- and your department for  
7 bringing this to the commission's attention. But  
8 while we all sit here and pile on the bad guy, but  
9 there are the ratepayers and the shareholders of --  
10 that are going to be affected. And my question is:  
11 If we go to a penalty phase and a remedy phase of  
12 this, you for the department and Ms. Pritt (sic) for  
13 the department will probably be the same people who  
14 will sit and have comments back and forth on what  
15 the remedies ought to be. And the big kahuna in the  
16 room today is not Qwest; it's the government,  
17 because ultimately we have the biggest stick and  
18 have -- can make the biggest impact.

19 So how do you and I step back from this  
20 today and then say, Okay, now all this has been done  
21 and all this has created a lot of work and shown  
22 what you suspected to be true if that's the case?  
23 How do we step back from that and say, Now how do we  
24 fairly affect the ratepayers in Minnesota? And  
25 that's going to be tough. I think it's the toughest

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1 much television, so it was lost on me.

2 MR. ALPERT: All right. I can't speak --  
3 Obviously as a lawyer you -- and we've seen this  
4 many times, that a lawyer takes positions for his  
5 client. And I can't -- I can't speak to, you know,  
6 whether you're piling on the legal team for taking  
7 the position of this company. This company's  
8 positions have been pretty uniform throughout, and  
9 That's, you know, wait till the absolute last  
10 second, till you're absolutely positively forced  
11 into doing something that you know you have to do  
12 before they do it. Would I feel uneasy? Yes, and  
13 with good cause.

14 COMMISSIONER KOPPENDRAYER: Well, one  
15 the -- One of the things that happens quite often,  
16 and you probably see it happen more right now when  
17 campaigns are going on than you will any other time,  
18 and that is people who are involved in government,  
19 in other words politicians, are the people who beat  
20 up on government the worst, and there's always a lot  
21 of accusations made. But the -- all of the people  
22 that have come and gone and moved around in this  
23 room. I'm sure that these folks over here have put a  
24 tremendous amount of hours into how to present this  
25 case and in the past have done that also. But it's

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1 document I've ever -- the toughest docket I've ever  
2 looked at and said, Now you have to figure out what  
3 to do to really fairly affect the ratepayers,  
4 including those of Qwest.

5 MR. ALPERT: Chair Scott, Commissioner  
6 Koppendraye, I hope to be continuing on in this --  
7 in the second phase. And you will notice that the  
8 department did not come down with specific  
9 recommendations. It recognized, as Judge Klein did,  
10 that money done will not do it. Before we start  
11 throwing out, you know, we see this, we need this.  
12 we need that, we were hoping for some direction from  
13 the commission as to -- as to what the commission  
14 sees. You're sitting up there. You see Qwest in  
15 all of these dockets. I see them in a limited  
16 number, although quite a few dockets. There's CLECs  
17 that have been affected, that will be affected.  
18 There are ratepayers in general. There are  
19 shareholders. There are employees out there that  
20 we're very concerned about as well. And this is a  
21 complicated docket. It is so inter -- inexplicably  
22 intertwined with the 271 initiative that this is  
23 part of the record in 271. There are specific  
24 findings here related to that.

25 So I can't tell you right now that I have



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1 a final answer for you that we are not going to be  
2 agonizing as well. I think that one of the things  
3 you need to do is be comfortable in your own minds  
4 as what can you do, and then you can then move on to  
5 what should you do. And it's not going to be an  
6 easy task. You've tried time and time again to get  
7 them to conform, and it hasn't worked. So the  
8 simple solutions aren't there. The money is so  
9 great, and I'm not talking just about potential  
10 penalties I mean. I'm talking about the interests  
11 in Qwest -- that Qwest has. The money out there is  
12 so tremendous that money alone will not deter.  
13 They're willing to spend whatever they want or have  
14 in.

15 COMMISSIONER KOPPENDRAYER: But that goes  
16 to a couple of things that I was thinking about, and  
17 that is that 27 I may well be a tremendous benefit to  
18 ratepayers in Minnesota, customers in Minnesota. It  
19 may or may not be. The irony of some of what we  
20 have in front of us today in Qwest's -- Qwest for  
21 271 may well have benefited ratepayers. In other  
22 words, I'm sure it's occurred to you, unless I'm  
23 thinking in a vacuum, but unless Qwest -- and the  
24 right or wrong is to be decided but Eschelon and  
25 McLeod and others' customers benefited by the deals

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1 I leave that to others. But that's what they have  
2 to meet. And if they meet it, then they should --  
3 If they met the criteria, they should get it. But  
4 what they've done here is try to subvert that whole  
5 process. And, you know, in the short term somebody  
6 charging 15 cents a gallon for gas is to the benefit  
7 of ratepayers in the short term. But if the true  
8 cost of gas is a buck and a half, in the long term  
9 no one will be around but the only -- the one  
10 survivor. And Qwest here is trying to determine,  
11 you know, who will the survivors be. And it's not a  
12 true level playing field. We're here to have  
13 competition, at least attempt to have competition;  
14 and Qwest has indicated it doesn't want it.

15 COMMISSIONER KOPPENDRAYER: I don't  
16 disagree with you, and I -- and I'm probably  
17 theorizing on something that you aren't looking at  
18 the same way. But what -- what I'm saying is we  
19 have to make our decision based on its impact on the  
20 ratepayers of Minnesota, based on what Qwest was  
21 supposed to do statutorily, did they do it or didn't  
22 they do it and what should the penalty be. And a  
23 lot of what I heard this morning is how egregiously  
24 somebody may or may not have been hurt, but it's not  
25 quantifiable. To me -- and tell me if I'm right or

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1 that they made. Had they had to offer 10 percent  
2 discount to everybody in their whole footprint and  
3 everybody that competed in their whole footprint, it  
4 probably would have never have been offered and,  
5 hence, nobody would have benefited. NOW, that  
6 doesn't make it right at all. But what I heard a  
7 lot of comments this morning is how -- how CLECs  
8 were disadvantaged by not being able to compete and  
9 how customers then were disadvantaged by not being  
10 able to compete. And we say, But it's not  
11 quantifiable. So if it's not quantifiable, then we  
12 have to look at the flip side and say, well, the  
13 advantage or disadvantage to customers, we have to  
14 set that aside because if we can't quantify it, we  
15 can't quantify the benefits either.

16 MR. ALPERT: Chair Scott, Commissioner  
17 Koppendraye, I guess the only thing I can say just  
18 in short -- I'm sure Dr. Fagerlund could come in and  
19 talk for hours on economics -- the United States  
20 Congress, in enacting the 1996 telecom act, decided  
21 that if an RBOC met its 14-point checklist and it  
22 was in the best interest -- the public interest,  
23 then they could get back into the long-distance  
24 market. Now, whether there's a true economic  
25 advantage in the ratepayers or not, I leave that --

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1 wrong -- I set that aside and I say, no, did they  
2 follow the law or didn't they? And if they didn't,  
3 then what should the penalty be? Not whether  
4 Eschelon or McLeod benefited greater than MCI or  
5 AT&T. Because if we go there, that's, la-la land.

6 MR. ALPERT: Chair Scott, Commissioner  
7 Koppendraye, I guess the only way I can say it is  
8 that Minnesota Statute 257.462 sets out eight or  
9 nine criteria that the commission must look at in  
10 order to evaluate what penalties -- at least  
11 monetary penalties under that portion of the statute  
12 are appropriate. And you may decide or the  
13 commission may decide as a whole after deliberation  
14 that damages to other CLECs is not quantifiable and,  
15 therefore, you will not use such criteria as part of  
16 your determination. But not all of the criteria  
17 have to be met. It's just that by a preponderance  
18 of the evidence or the greater weight of the  
19 evidence says that penalties are appropriate in a  
20 particular amount.

21 We believe -- The department's position  
22 is that as monetary penalties are concerned, there's  
23 more than enough evidence in this record for maximum  
24 penalties on each of the violations in this  
25 particular case. Now, there may be a dispute as to

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1 how many of those are or the number of days. But in  
2 terms of -- you know, there may be a dispute. But  
3 in terms of is there enough evidence for the  
4 maximum, which is only \$10,000 per day per  
5 violation, we believe that there is. But, again,  
6 you may decide that you're basing it on certain  
7 criteria in the statute, and other commissioners may  
8 decide that other criteria are sufficient.

9 COMMISSIONER KOPPENDRAYER: And you all  
10 heard the same as I did: that MCI and AT&T when  
11 they're asked. All right, so you're harmed; to what  
12 extent is Eschelon and McLeod culpable and how  
13 should they be affected in this, and they don't want  
14 to take a position.

15 MR. ALPERT: Chair Scott, Commissioner  
16 Koppendraye, I think --

17 COMMISSIONER KOPPENDRAYER: That's --  
18 That's troubling to me.

19 COMMISSIONER JOHNSON: That's another  
20 subject.

21 MR. ALPERT: I think it's -- I think it's  
22 difficult to ask anyone about the position that  
23 they're not going to be able to take. I mean, it's  
24 one thing to ask them, you know, Does your company  
25 have a formal position; what are you going to do

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1 quantifiable, I think that there are two issues.  
2 Some of them are. In fact, one of the easiest  
3 things to calculate is to look at every -- every  
4 purchase that a CLEC made operating in Minnesota and  
5 apply 10 percent across the board. I mean, that's a  
6 very quantifiable damage. And, I mean,  
7 that is something that's black and white; that Qwest  
8 has the information. They know the amount of money  
9 that they receive from every single CLEC sitting  
10 here and every single CLEC in Minnesota. So that is  
11 something that's easily quantifiable. Some other  
12 things are more difficult.

13 CHAIR SCOTT: All right. Let's -- My  
14 thought was we go to Mr. Marker, and then we give  
15 Qwest the last say on this first issue; and then we  
16 take our lunch break, come back and talk remedies.  
17 Is that all right with everybody?

18 COMMISSIONER REHA: Sounds good to me.

19 CHAIR SCOTT: Is that all right?

20 All right. Mr. Marker.

21 MR. MARKER: Mr. Chair, Commissioners,  
22 thank you. I'll be very brief. Our involvement in  
23 this docket has been limited to commenting on the  
24 applicability -- on the applicable filing standard  
25 for this commission. Unlike the other parties at

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1 about this? It's another thing to comment about  
2 what others should possibly do. As indicated, any  
3 damages that a particular CLEC may have for the  
4 conduct here may or may not relate to the individual  
5 CLEC. Should the CLEC disgorge -- be disgorged of  
6 the unlawful profits they made or the unlawful  
7 redunions? I mean, I don't know. We're -- We will  
8 continue with our investigation, and we will look at  
9 that and certainly accept or at least consider  
10 what's appropriate in those particular cases.

11 I don't disagree with your basic premise  
12 that sometimes it takes two. To what degree is it  
13 two or the overwhelming power of one in these  
14 particular cases may be for you to decide another  
15 day, but we've been concentrating on the main actor.

16 COMMISSIONER KOPPENDRAYER: I appreciate  
17 your comments because I have to figure this out.

18 CHAIR SCOTT: Let's go to Mr. Marker.

19 MS. LEHR: Could I just respond?

20 CHAIR SCOTT: Quickly. But I want to --  
21 everybody needs to talk.

22 MS. LEHR: I'm sorry. I just want  
23 clarify something that I said before that may --  
24 Commissioner Koppendraye may not have heard or --  
25 With respect to commenting on damages that are

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1 the table, we were not involved in the development  
2 of the factual record in this case.

3 With that caveat, we do support the  
4 findings and conclusions of the ALJ and believe they  
5 should be adopted by this commission.

6 CHAIR SCOTT: Any plans from the attorney  
7 general in this docket moving forward?

8 MR. MARKER: The attorney general is  
9 certainly interested in the next phase of this case  
10 and what that means as far as resolution of the  
11 remedy issue. I think he's interested in the ALJ's  
12 comments that a resolution be won -- be creative and  
13 beneficial to ratepayers. But beyond that I can't  
14 be specific.

15 CHAIR SCOTT: Can you tell us if he's  
16 thinking about an antitrust action?

17 MR. MARKER: I cannot tell you if he's  
18 thinking about an antitrust action.

19 CHAIR SCOTT: All right. Any other  
20 questions for Mr. Marker?

21 COMMISSIONER REHA: I'll go ahead --

22 CHAIR SCOTT: Commissioner Reha.

23 COMMISSIONER REHA: -- and ask a  
24 question, if I could. There were all sorts of  
25 rumors flying around last week that there was some

<p style="text-align: right;">Page 98</p> <p>1 kind of settlement agreement between the attorney 2 general and Qwest. And I was just wondering, maybe 3 you should satisfy this audience as to what's going 4 on there.</p> <p>5 MR. MARKER: Mr. Chair, Commissioner 6 Reha, there has not been a settlement agreement 7 between the attorney general and Qwest. There was a 8 mediation session on Friday between the government 9 agencies and Qwest that was put together after Qwest 10 made contact with the attorney general to discuss 11 the case. Beyond that I don't think I'm at liberty 12 to comment on the mediation, except to say it did 13 not result in resolution. So here we are.</p> <p>14 COMMISSIONER REHA: Thank you.</p> <p>15 CHAIR SCOTT: All right. Let's give 16 Qwest the final word then on the matter of approving 17 the ALJ's report.</p> <p>18 Mr. Topp.</p> <p>19 MR. TOPP: I guess would it be possible 20 to have a couple of minutes? We've had a number of 21 things that have been sued; and if we could have a 22 couple of minutes before putting in our response, 23 I'd really appreciate that.</p> <p>24 CHAIR SCOTT: All right. Shall we take a 25 couple of minutes and we stay here?</p>	<p style="text-align: right;">Page 100</p> <p>1 unfavorable light for trying to defend a proceeding 2 that has been brought against us with these 3 significant issues in front of us.</p> <p>4 You know, in particular, some of the 5 facts that -- or allegations that Mr. Alpert has 6 raised just simply aren't correct. We did not have 7 the right people involved in making the decisions as 8 to whether to file or not at the time that these 9 agreements were entered into. The policy and law 10 group was not a part of that process. You will not 11 see evidence in the record with respect to the major 12 agreements at issue here that it was. The right 13 people are involved now. This is an issue that 14 we're very concerned about, we're taking appropriate 15 steps to deal with, and we think that the commission 16 will be able to see that we are doing so on a 17 going-forward basis.</p> <p>18 CHAIR SCOTT: All right. My thought is 19 that we -- we adjourn for lunch, and then we come 20 back for the afternoon and take up the 21 remedy/penalty phase. Is that all right with 22 everybody?</p> <p>23 Yes Mr. Alpert.</p> <p>24 MR. ALPERT: Is the commission going to 25 consider adopting the findings before moving on to</p>
<p style="text-align: right;">Page 99</p> <p>1 MR. TOPP: That would be great.</p> <p>2 CHAIR SCOTT: All right. So let's just 3 hang out while Qwest gathers its thought. 4 (Whereupon, a recess was held from 5 11:55 a.m. to 12:03 p.m.)</p> <p>6 CHAIR SCOTT: All right, folks, let's 7 gather back together here. And we'll go to Qwest 8 Mr. Topp.</p> <p>9 MR. TOPP: Thank you, Chair Scott. I 10 think, you know, there are a number of things that 11 have been raised in the course of this proceeding, 12 and -- or in the course of this hearing. And rather 13 than go through detail by detail with respect to 14 those allegations that have been raised, you know, 15 certainly we've got disagreements regarding where 16 the line is drawn as to our obligation to file. 17 We've taken legal positions, and we -- that we think 18 are appropriate based on the law; and we think, you 19 know, that this really needs to be looked at in the 20 context of the very serious remedies that have been 21 raised in the course of this process. And we -- 22 It's been necessary for us to -- at those positions 23 as a part of this. And we don't think that it's 24 appropriate for the commission -- or we don't think 25 that the commission should look at us in an</p>	<p style="text-align: right;">Page 101</p> <p>1 the next phase?</p> <p>2 CHAIR SCOTT: Yeah, I don't know about 3 that. Do we want to do that or do we want to just 4 go to the next phase? I could --</p> <p>5 COMMISSIONER REHA: I think --</p> <p>6 CHAIR SCOTT: -- go either way.</p> <p>7 COMMISSIONER REHA: -- since we -- sin -- 8 we bifurcated --</p> <p>9 CHAIR SCOTT: Your mike.</p> <p>10 COMMISSIONER REHA: Since we bifurcated 11 it, I wouldn't be opposed to continuing that 12 bifurcation, in other words, deciding on whether or 13 not to adopt the ALJ's report, with or without 14 modification, and then go to the second phase. I 15 think it would be cleaner in that respect.</p> <p>16 CHAIR SCOTT: That's fine.</p> <p>17 COMMISSIONER REHA: And I, you know, 18 and --</p> <p>19 CHAIR SCOTT: Is --</p> <p>20 COMMISSIONER REHA: -- I'm --</p> <p>21 CHAIR SCOTT: -- hat a motion?</p> <p>22 COMMISSIONER REHA: Do we need a motion 23 here?</p> <p>24 CHAIR SCOTT: I would guess --</p> <p>25 COMMISSIONER REHA: I think --</p>

1 CHAIR SCOTT: --we do.  
 2 COMMISSIONER REHA: -- it's ~~pan~~ of the  
 3 chair's call on the procedure here. But that's my  
 4 opinion. I don't know if the other commissioners  
 5 agree with me on that --  
 6 COMMISSIONER JOHNSON: Sure.  
 7 COMMISSIONER REHA: -- or not.  
 8 CHAIR SCOTT: That's fine with me. We  
 9 can vote on this, the adoption issue, and then move  
 10 into the next phase.  
 11 COMMISSIONER REHA: Well, I wasn't  
 12 prepared necessarily to adopt the ALJ's report right  
 13 now without some deliberation among us. But I'm  
 14 just talking about the procedure of bifurcating our  
 15 decision-making process.  
 16 CHAIR SCOTT: The procedure is fine.  
 17 Here's my deliberation: Let's adopt the ALJ report.  
 18 COMMISSIONER REHA: Well, I have some  
 19 things I want to say --  
 20 CHAIR SCOTT: Go ahead.  
 21 COMMISSIONER REHA: -- but 1 -- maybe we  
 22 should take our lunch break and then come back  
 23 and --  
 24 CHAIR SCOTT: Do you want to do it after  
 25 lunch? Okay.

1 written down. And I think that we need to talk  
 2 about nonmonetary remedies. For example, I'd like  
 3 to hear from people about withdrawing the  
 4 certificate of authority and making it conditional  
 5 for a period of time so that maybe Qwest goes out  
 6 and finds new owners for us here in Minnesota.  
 7 Maybe we conclude that Qwest isn't the company for  
 8 us.  
 9 But I just -- I thought I'd at least just  
 10 kind of put same things out there. The department  
 11 talked about guidance. Nobody was very specific in  
 12 terms of what we were going to talk about this  
 13 afternoon, but that at least gives us something to  
 14 start off on. But we'll start first with the matter  
 15 of whether to adopt the findings. So let's come  
 16 back -- what -- should we make it 1:00?  
 17 COMMISSIONER REHA: Sounds good.  
 18 CHAIR SCOTT: Let's come back at 1:00  
 19 then.  
 20 (Whereupon, a recess was held from  
 21 12:10 p.m. to 1:03 p.m.)  
 22 CHAIR SCOTT: All right, folks, let's  
 23 come back together after our lunch break. And the  
 24 commission will deliberate whether or not to adopt  
 25 the ALJ's report in its entirety or with

1 COMMISSIONER REHA: --decide it.  
 2 CHAIR SCOTT: Let's do that. We'll do  
 3 it. So the first thing the commission will do is  
 4 take up the issue of whether or not to adopt the A U  
 5 report. Then we'll move into remedies/penalties.  
 6 Could I just share a few thoughts on the  
 7 remedies/penalties? I've been writing down things  
 8 as people have been saying them just to think about  
 9 for the afternoon. I've heard people talk about  
 10 putting in process place for monitoring and/or  
 11 auditing interconnection agreement negotiations.  
 12 I've heard -- I -- My sense is that we need to think  
 13 about whether the agreements in question have to be  
 14 made available again for a period of time equal to  
 15 the original term. I think that we need to talk  
 16 about the amount of the penalty and maybe doing  
 17 something creative with that penalty. Instead of  
 18 making a penalty payable to the general fund, maybe  
 19 it's a penalty that somehow is paid by Qwest through  
 20 discounts to CLECs or -- You know, there's some --  
 21 something -- we do something with the money that  
 22 benefits the telecommunications industry instead of  
 23 sticking it into the general fund. The department  
 24 looking at the conduct of the CLECs involved here I  
 25 think is something that has come up and we've

1 modifications.  
 2 Thoughts on that from my fellow  
 3 commissioners?  
 4 COMMISSIONER REHA: Well, Mr. Chair, I  
 5 guess I'll --  
 6 CHAIR SCOTT: Commissioner Reha.  
 7 COMMISSIONER REHA: -- I'll start. And  
 8 I've been mulling this over in my head a little bit  
 9 over lunch. And when Qwest indicates that this is a  
 10 issue of where do we draw the line and -- and  
 11 that -- that brings to mind to me the accountant who  
 12 advises his client with respect to the IRS that you  
 13 should always interpret the regulations or the law  
 14 in a manner that most favors the company; and by  
 15 doing so you bear the risk of when the IRS would  
 16 decide that your interpretation is wrong you are  
 17 liable for the disputed tax as well as the penalties  
 18 that go along with it. And so, therefore, I think  
 19 the company takes a risk by treading that line. And  
 20 in some cases when that line is treaded and there is  
 21 very little interpretation or -- interpretation that  
 22 supports the way you've drawn the line, that you can  
 23 also be liable for more serious penalties and  
 24 perhaps even criminal violations of the law. And  
 25 I'm not suggesting that that's the case in this --

1 in this matter, but I think it's a risky strategy  
2 that the company is taking by always interpreting  
3 where to draw that line. It's like waking a tight  
4 rope; and if there's any way that doubt can be  
5 impugned, that it should always be interpreted in  
6 the favor of the company. That's fine if that's *the*  
7 strategy you *want* to take; but then when the body  
8 that is responsible for making the decisions decides  
9 (then that your interpretation is wrong, you bear  
10 the -- you bear the penalties that go along with  
11 that interpretation and -- and then eventually the  
12 court, if you wish to challenge it further and allow  
13 the courts to take a look at it.

14 So I don't begrudge Qwest for always  
15 trying to fight where to draw that line. It's just  
16 that when that line is drawn incorrectly that you  
17 accept the penalties that come with that decision.  
18 And in this era of accounting scandals and corporate  
19 ethical issues, I'm sure that there were plenty of  
20 accountants with some of the large companies out  
21 there that -- that thought that the way they were  
22 interpreting the application of the accounting  
23 principles had some basis in interpretation; and  
24 we're seeing now that they crossed over the line on  
25 those calls. and we're seeing what happens in that

1 Klein did. It was a very fact-intensive proceeding.  
2 He made specific findings of fact. He made specific  
3 conclusions of law. He decided where the line  
4 should be drawn with respect to these provisions.  
5 And -- And, in my view, Mr. Chair, the line is drawn  
6 in the favor of competition.

7 And to address some of the concerns that  
8 my colleague, Commissioner Koppendmyer, has  
9 indicated with respect to the public interest and  
10 consumers and so forth, I think in the long run a  
11 level playing field with respect to competition is  
12 in the long-term best interest of the consumer  
13 because only then will the consumer be able to  
14 benefit from that competition. And agreements that  
15 favor one competitor above other competitors is not  
16 that level playing field. And so I think the -- the  
17 greater good of the general public. With respect to  
18 maybe a small portion of the public that may have  
19 temporarily been able to benefit from a sweetheart  
20 deal is the direction that we should be emphasizing.

21 And so, with that, I would be in favor of  
22 adopting the findings of fact, conclusions of  
23 law of the administrative law judge. And I  
24 believe that Judge Klein did do a  
25 interconnection-agreement-by-interconnection-

1 circumstance.

2 So, Mr. Chair, giving this an incredible  
3 amount of thought, it's my view that maybe it is an  
4 issue of where *do you draw the line*; and in this  
5 case Qwest is wrong on where they drew the line with  
6 respect to each of these agreements and whether or  
7 not they constituted interconnection agreements that  
8 should have been filed with the commission. I think  
9 the statute -- and the FCC agreed that the statute  
10 is what the statute says; that where there is an  
11 ongoing obligation pertaining to UNEs and other  
12 services and also dispute resolution and escalation  
13 provisions that you take a look at it on a  
14 case-by-case basis and -- and if they're  
15 interconnection agreements, they need to be filed.

16 Also, I think the FCC clearly stated in  
17 its guidance that, We believe that the state  
18 commissions should be responsible for applying in  
19 the first instance statutory interpretation be set  
20 forth today to the terms and conditions of specific  
21 agreements. Indeed, we believe this is consistent  
22 with the structure of Section 252, which vests in  
23 the states the authority to conduct fact-intensive  
24 determinations relating to interconnection  
25 agreements. And I think that's exactly what ALJ

1 agreement analysis of every one of the  
2 interconnection agreements that it was faced. And,  
3 in fact the whole report is organized in that  
4 fashion; and I think he did a very thorough job.

5 CHAIR SCOTT: Thank you, Commissioner  
6 Reha. Let me ask you, Commissioner Reha, would you  
7 add the state statutory cites as well? That's Roman  
8 Numeral 1B. Staff sets it up on page 10. The ALJ  
9 cites 09 and 121 --

10 COMMISSIONER REHA: Right.

11 CHAIR SCOTT: -- In the introduction, but  
12 then he doesn't in his conclusions in terms of  
13 violations.

14 COMMISSIONER REHA: Yeah.

15 CHAIR SCOTT: Would you add those?

16 COMMISSIONER REHA: I think it  
17 certainly -- His findings and conclusions are  
18 consistent with the state statutes.

19 CHAIR SCOTT: Yeah.

20 COMMISSIONER REHA: I agree.

21 CHAIR SCOTT: Okay.

22 COMMISSIONER REHA: So, yes -- yes,  
23 Mr. Chair, I think that could be certainly added as  
24 a modification.

25 CHAIR SCOTT: All right. Any other

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1 comments, thoughts, deliberations?

2 The -- The one thing I'd like to say is  
3 that I was in the room when Audrey McKenney  
4 testified, and Judge Klein got it right. Her  
5 testimony was flip, sarcastic, evasive. And her  
6 testimony about being able to afford 50 million  
7 bucks like nothing was just that flip and just that  
8 sarcastic. And I think the deposition transcript,  
9 of course, doesn't really do it justice because it  
10 can't present the way and the demeanor of the  
11 witness, but it truly was that flip.

12 Any other thoughts?

13 COMMISSIONER JOHNSON: Well, Mr. Chair --  
14 CHAIR SCOTT: Commissioner Johnson.

15 COMMISSIONER JOHNSON: -- I feel exactly  
16 the way that apparently you do and Commissioner  
17 Reha. I think the judge did an excellent job. But  
18 even -- I mean, he did a fine job and brought this  
19 all to light. Of course I wasn't aware of any of  
20 this. But it really bothers me that we've been  
21 sitting here for years vying to promote  
22 competition, trying to -- to open this whole system  
23 up to competition, and then people are working  
24 behind our back making secret deals. I mean, it  
25 just -- just isn't right. And I'm really upset with

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1 MR. MENDOZA: That were not included in  
2 our complaint?

3 COMMISSIONER JOHNSON: Right.

4 MR. MENDOZA: Can I consult with counsel  
5 for a minute on that one?

6 Mr. Chair, Commissioner Johnson, I guess  
7 the bottom line is that we're not sure. There was  
8 apparently -- I was not in the room when this was  
9 brought up, but during the 1371 hearing there was  
10 apparently some allusion to another agreement that  
11 possibly may involve Covad. Obviously we will take  
12 a look at that. I believe that was all stated at a  
13 public hearing. I don't think it was covered by any  
14 trade secret exception or not. But the bottom line  
15 is that we don't know. We've been told, I believe,  
16 by the company that there aren't anymore; and we're  
17 also not aware whether there may be any agreements  
18 in other states that could --

19 COMMISSIONER JOHNSON: I appreciate that.

20 MR. MENDOZA: -- affect CLECs in  
21 Minnesota. So the answer, I guess, is we don't  
22 know.

23 COMMISSIONER JOHNSON: Thank you

24 And with that I guess is my answer,  
25 Mr. Chair. I fully support the ALJ's report.

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1 the company for doing this. Hopefully it isn't some  
2 of our people from Minnesota that are doing this;  
3 that they've gotten the direction from elsewhere.  
4 But it's really devastating to me that this is what  
5 it's come to. Fortunately, it was brought out by  
6 Desktop or -- and the department looking into it.  
7 And so I wholeheartedly agree that we take the ALJ's  
8 position on this, both state and federal.

9 And I just have one more question. I  
10 know we're in this mode, but could I ask Tony or  
11 someone --

12 CHAIR SCOTT: Yeah.

13 COMMISSIONER JOHNSON: -- a question?  
14 Are there still any of these agreements ongoing? I  
15 realize that we've been through all this, but --

16 CHAIR SCOTT: You mean are there -- [ h a  
17 agreements besides these?

18 COMMISSIONER JOHNSON: Yes.

19 MR. MENDOZA: Mr. chair, Commissioner  
20 Johnson, are you talking about whether the  
21 agreements that were raised in our complaint --

22 COMMISSIONER JOHNSON: Both really.

23 MR. MENDOZA: -- are they still --

24 COMMISSIONER JOHNSON: Do we know of any  
25 others that are still ongoing in light of all this?

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1 CHAIR SCOTT: Any other thoughts before  
2 we vote?

3 Commissioner Reha, do you have a motion  
4 in mind?

5 COMMISSIONER REHA: 111 move -- Is there  
6 a specific decision option on that?

7 COMMISSIONER JOHNSON: Yeah, there is.

8 COMMISSIONER REHA: What page?

9 COMMISSIONER JOHNSON: 9, 10, and 11.

10 COMMISSIONER REHA: I guess I will move  
11 option 1(A)(2) with the amendment including the  
12 state law citation.

13 CHAIR SCOTT: Okay. That's fair enough.

14 Is that good enough, Peter? All right.

15 Thank you, Commissioner Reha.

16 You've heard the motion. Any further  
17 discussion of the motion?

18 MS. HAMMEL: Mr. Chair.

19 CHAIR SCOTT: Yeah

20 MS. HAMMEL: Perhaps you could clarify  
21 for the record which sections of state law you're --

22 MR. O'GRADY: Page 10.

23 MS. HAMMEL: -- you're finding.

24 COMMISSIONER REHA: Page 10. Sure.

25 CHAIR SCOTT: There's three of them

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1 there. 237.09?

2 COMMISSIONER REHA: I guess all three --

3 CHAIR SCOTT: Yeah.

4 COMMISSIONER REHA: -- Mr. Chair.

5 CHAIR SCOTT: All right. So it's 237.09;

6 237.121, subdivision 5; 237.60, subdivision 3.

7 MR. BROWN: I(b), 1(c) on that, knowing  
8 and intentionally?

9 CHAIR SCOTT: Yes.

10 COMMISSIONER REHA: Yes. And 1(b), 3(c),  
11 yes, sir.

12 CHAIR SCOTT: And 1(b), 2(c).

13 COMMISSIONER REHA: So there's --

14 CHAIR SCOTT: All right. Any further  
15 discussion of the pending motion? Hearing none, all  
16 those in favor signify by saying aye.

17 ALL COMMISSIONERS: Aye.

18 CHAIR SCOTT: Those opposed?

19 Motion carries 4/0.

20 Let's now then talk about remedies. I  
21 guess at this point I'd go back to the department.  
22 It's your complaint.

23 Mr. Mendoza.

24 MR. MENDOZA: Good morning, Mr. Chairman,  
25 Commissioners. Tony Mendoza on behalf of the

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1 The common theme that I see throughout  
2 all of those cases has been an inherent conflict of  
3 interest between the wholesale division of their  
4 company in favor of its retail side. And the  
5 department's viewpoint is that this case presents  
6 probably a better opportunity than you will ever  
7 have for the future that I can see -- and that may  
8 not be very long. But I think this is an  
9 opportunity that can't be passed up by this  
10 commission to change the landscape of competition  
11 for the better for the consumer for a long time to  
12 come. And I took ALJ Klein's recommendation exact  
13 that way, I think he was talking about, as  
14 Mr. Alpert alluded to for the department earlier,  
15 that monetary penalties in this case aren't enough.  
16 Even at the maximum that appear in Mr. O'Grady's  
17 briefing papers pale in comparison to the amount  
18 that this company has potentially coming to it in  
19 Section 271.

20 However, the department is also very  
21 aware, as Commissioner Reha and I believe,  
22 Commissioner Koppendrayr, you pointed out, that  
23 there is also -- we are dealing with a troubled  
24 company right now; and there are the interests of  
25 ratepayers, there are the interests of shareholders,

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1 Minnesota Department of Commerce. As you've seen in  
2 our briefing papers, we also asked to have the issue  
3 of penalty/remedy for violations that occurred in  
4 this case to be handled in a bifurcated proceeding  
5 And I think we still support -- we do support that,  
6 that type of a process. But I certainly understand  
7 the commission's willingness and desire to hear from  
8 the parties at least for now, and at this point I  
9 think I'll be talking more in bigger picture  
10 concepts than with regard to the specific plan or  
11 remedial plan that we have in mind. We have  
12 certainly been thinking about it heavily, and we do  
13 have some thoughts about it.

14 You know, Qwest has throughout this  
15 proceeding made the point that this case  
16 fundamentally is about line drawing. And I  
17 respectfully disagree with that opinion. I think  
18 what we have here and anybody that's been involved  
19 in this industry in Minnesota is aware that we --  
20 this is not the first time that we've had a problem  
21 with this company, particularly with respect to its  
22 wholesale service quality. The problems date back  
23 all the way almost to the beginning of the '96 act  
24 and this commission's pioneering first efforts to  
25 implement those provisions.

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1 there are the interests of employees of this company  
2 in this state that are going to be affected -- that  
3 could be affected by whatever this commission does,  
4 including if this commission chooses just to invoke  
5 monetary penalties.

6 We have heard a lot of promises from this  
7 company over the last -- particularly the last two  
8 years. Some of those we have under investigation by  
9 the order of this commission in the financial  
10 investigation of the company. Promises were made to  
11 hire certain amounts of employees. I think there's  
12 a goal question on there, and we are investigating  
13 whether those promises have been complied with.  
14 Promises have been made that this -- the  
15 administration of Qwest under Joe Nacchio was a new  
16 company that they embraced competition. As the  
17 chairman alluded to earlier, I think this company  
18 has done a worse job of implementing the  
19 telecommunications act provisions than the old  
20 U S "EST did, and that wasn't much to talk about  
21 either.

22 So I view this case -- and maybe I am  
23 just too deep into it. But I view this case as an  
24 opportunity to change the way local phone  
25 competition is done in this state for a period of

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time to come. I don't think you'll have another opportunity like this.

The -- And, with that, those just sort of opening general comments, I'd like to kind of go down, tick down the list that Chairman Scott talked about before we broke for lunch. And I've got some of my own thoughts, but let me premise -- or preface that with two thoughts.

The department's view is that [here is really, I think, two major incentives or remedial options that really are -- have any chance at all of being effective, and I'm not certain even if these will get the job -- could get the job done. But the first is in some sort of a structural remedy that eliminates the inherent conflict of interest that we see throughout the findings in this case, throughout the findings in the AT&T UNE-P complaint docket, throughout the Desktop Media complaint, throughout -- I mean, going back throughout this process. The last year I think can be indicated by a pattern of Qwest being willing to provide what it's obligated to provide under federal law under Sections 251 and 252 of the act only in exchange for the approval of long-distance authority, which is a retail interest for this company. And in many ways,

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I mean. I think that -- if you look back at the pattern of conduct of this company over that time, that is -- that exemplifies the inherent conflict that exists. Well, I think that inherent conflict does stem, in part, from the act itself. And if you look back at Section 271, that's -- this is exactly what 271 was designed to do. I mean, you can use 271 to accomplish those goals. There's no secret this company in particular, maybe not under U S WEST, but certainly after Qwest took over, it is -- it is the brass ring for this company, at least for right now. And so you have -- This commission has the opportunity to make 271 work the way it was supposed to work. And I would tell you that that's probably your most short-term option available to you for changing the behavior of this company in the long term.

I would also say though that withholding this authority does present -- and I don't have any evidence here to quantify that, but it does present some risks to Qwest as a going entity. I think that maybe is a legitimate concern that we should -- we should be thinking about. And that's why I think we also need to consider, even if 271 were granted and even with the QPAP that is supposedly going to

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ensure long-term compliance with the 271 checklist points, whether this -- this integration of wholesale and retail interests within the same corporate entity is a workable environment for competition, and we respectfully don't believe that it is. And so I think that's another consideration that we need to think about, is some sort of a structural remedy that separates the retail interest of this company and their wholesale interest.

And so I think those are the two -- the two most viable options that this commission has for -- and if not both, for changing the behavior of this company going forward.

In terms of revocation -- And maybe this needs to be explored a little bit more from hearing actually from what you, the commissioners, think. But if it's -- What I sort of read into the staff briefing papers, particularly the option that perhaps you could revoke just the retail certificate, was a vehicle for getting toward structural separation of the company. Full revocation of their authority with a condition that they sell the company, again I'm not sure I see the end gain in that -- in that option. Maybe --

CHAIR SCOTT: New players.

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MR. MENDOZA: Well, but we saw new players two years ago. And I guess I just don't see whether changing the players at the top eliminate. I'm beginning to think that the way the act is set up is just inherently contrary to human behavior, that --

CHAIR SCOTT: Oh, yeah.

MR. MENDOZA: That --

CHAIR SCOTT: I mean, I've said that publicly.

MR. MENDOZA: Yeah,

CHAIR SCOTT: You don't know if it's inherently contrary or if it's like two 16 year olds setting their bedtime.

MR. MENDOZA: Well --

CHAIR SCOTT: One can, one has the maturity to do it; and one doesn't. You know, because you'd have to believe -- Some folks have gotten 271. You'd have to believe that somebody up there thinks that same companies pull this off, right?

MR. MENDOZA: True enough.

CHAIR SCOTT: So.

MR. MENDOZA: But, again, I -- I have my doubts about whether just a new set of faces is



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1 enough

2 CHAR SCOTT: Yeah.

3 MR. MENDOZA And so I think that's  
4 something that we need to develop. But I guess  
5 that's my initial thoughts on revocation.

6 I certainly think there needs to be a  
7 remedy for -- or at least we need to talk about a  
8 remedy for CLECs that were not privy to these  
9 special arrangements, including, as you suggested,  
10 Chairman Scon, perhaps going back and requiring  
11 these agreements to be filed and available to  
12 competitors for some period of time. I'm not sure  
13 how long that would be, but I think that that is  
14 definitely something that should be on the table in  
15 any kind of remedial phase.

16 I think that you're going to want to hear  
17 from some of those CLECs and give them an  
18 opportunity to come and be heard about the way  
19 they were affected. Some of them I don't think  
20 necessarily had the resources to participate as  
21 fully as they might have wanted to in this case. I  
22 see some of them in the room here today. We were  
23 able to have some of them come in and tell the ALJ  
24 how they were affected, and that evidence is in the  
25 record: but you may want to hear some more from some

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1 things that Qwest has raised, monitoring or auditing  
2 of interconnection agreement negotiations,  
3 personally I don't see why government should be  
4 asked to be that involved in the day-to-day business  
5 of a company that has, definite and clear legal  
6 obligations out there. We're certainly, you know,  
7 interested to hear what Qwest has to say about how  
8 open of a process that would be, but I don't think  
9 that the department and I'm not sure that the  
10 commission has the resources to be involved or at  
11 the table at every single negotiation that occurs  
12 between two CLECs -- or between CLECs and Qwest

13 The conduct of the other CLECs in this  
14 case. I think Mr. Alpert fairly covered it. I'm  
15 not happy with the conduct of the other CLECs that  
16 were parties to this case either. We will and -- We  
17 will open an investigation. As Mr. Alpert alluded  
18 to, we've had a very busy summer with 271 and this  
19 case, pricing complaints, lots of things going on.  
20 But we clearly were disturbed by the evidence that  
21 was produced in this case. And I think now that  
22 this commission has told us there was something  
23 seriously wrong here, we will -- we will pursue the  
24 other actors and investigate their conduct as well.

25 I think that covers all the points that

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1 of the CLECs and get some input on what remedies  
2 they think are appropriate.

3 I agree with -- again with the chair, and  
4 I think it's generally been kind of this  
5 commission's approach that monetary penalties into  
6 the general fund really -- at least the part about  
7 going to the general fund don't help anybody. And  
8 we would support coming up with some creative ways  
9 for whatever type of a -- whatever amount of  
10 monetary penalty this commission ultimately finds is  
11 appropriate to try to use those in some creative  
12 fashion other than simply helping the budget with  
13 its -- helping the state's budget problems.

14 One other point that the department would  
15 ask the commission to consider, and that is  
16 making -- for the benefit I think of other states  
17 and parties that -- competitors out there or  
18 interested parties that weren't necessarily parties  
19 in this case, making the record in this case public  
20 and understanding, allowing all the parties involved  
21 to see exactly what happened here. Not all of the  
22 evidence in this record is public. Some of it  
23 still is trade secret. Making all of -- all of the  
24 record in this case a public -- open to the public.

25 Let's see. In terms of some of the

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1 you had raised, Chair Scon I'd be happy to answer  
2 questions or address ideas from the other parties or  
3 from any of the members of the commission. But,  
4 again, I want to emphasize that I believe this is a  
5 very unique opportunity, and I think the two most  
6 viable options you have for changing the behavior of  
7 this company going forward are not approving this  
8 company's Section 271 application -- obviously  
9 that's an issue that's being dealt with in other  
10 dockets, but the entire record in this case is  
11 incorporated into those dockets -- and some sort of  
12 a structural remedy to change the behavior of this  
13 company going forward. One moment.

14 CHAIR SCOTT: Yeah.

15 MR. MENDOZA: Just one other point. That  
16 if we do go into another proceeding, we would ask  
17 the commission to at least issue an advisory that  
18 that proceeding is not about relitigating the merits  
19 of the case and that we are talking about -- about  
20 the remedy for the conduct that this commission just  
21 found to have occurred.

22 CHAIR SCOTT: All right. Thank you,  
23 Mr. Mendoza

24 Any questions of Mr. Mendoza?

25 COMMISSIONER KOPPENDRAYER: So --

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1 CHAW SCOTT: Commissioner Koppendraye.  
 2 COMMISSIONER KOPPENDRAYER: -- let me see  
 3 if I understand, Mr. Mendoza. This wasn't a pick  
 4 and choose. What you're putting -- What you're  
 5 proposing to the commission is that commission do  
 6 not approve their 271 request that -- and that the  
 7 commission revoke their authority to operate as a  
 8 retail provider for telephone services, hence,  
 9 forcing structural separation and impose monetary  
 10 fine, that benefit the aggrieved parties and the  
 11 ratepayers?  
 12 MR. MENDOZA: Mr. Chair, Commissioner  
 13 Koppendraye, I don't think that I spoke in favor of  
 14 revocation unless it was --  
 15 COMMISSIONER KOPPENDRAYER: You said  
 16 revocation of certificate of authority --  
 17 MR. MENDOZA: As a vehicle --  
 18 COMMISSIONER KOPPENDRAYER: -- of retail.  
 19 MR. MENDOZA: AS a vehicle for achieving  
 20 some sort of structural remedy. I also want to  
 21 again clarify that you know, we do not have a  
 22 defined plan. I wouldn't talk about it --  
 23 COMMISSIONER KOPPENDRAYER: I was going to  
 24 to ask --  
 25 MR. MENDOZA: -- in those terms.

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1 MR. MENDOZA: Yeah.  
 2 COMMISSIONER KOPPENDRAYER: --total.  
 3 MR. MENDOZA: That's true. We are not  
 4 recommending those things today to you. I'm telling  
 5 you things that we have thought about, and I'm  
 6 trying to share with you some of the department's  
 7 internal thought process up until now about what we  
 8 think would be an effective remedy. But we do not  
 9 have a final plan that we're recommending to you  
 10 today. But I think it's fair for the department to  
 11 be up front about things that we are thinking about  
 12 and to share with you that we do believe that this  
 13 is an opportunity you will not have again to change  
 14 things for the better far the time we come.  
 15 So we -- Yeah, I'll be -- I'm glad you  
 16 clarified that for me.  
 17 CHAIR SCOTT: Other questions for  
 18 Mr. Mendoza?  
 19 Commissioner Johnson.  
 20 COMMISSIONER JOHNSON: Thank you,  
 21 Mr. Chair.  
 22 Then, Mr. Mendoza, the amount of fine  
 23 that you're thinking about?  
 24 MR. MENDOZA: We haven't really --  
 25 COMMISSIONER JOHNSON: Addressed that

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1 COMMISSIONER KOPPENDRAYER: -- that as the  
 2 next question. What's your plan then for service to  
 3 people who need telephone service?  
 4 MR. MENDOZA: Well, that's not what I was  
 5 going to refer to. What I'm telling -- What I'm  
 6 telling you is that I'm not giving you the  
 7 department's position. I'm telling you what I -- a  
 8 least for your benefit things that we have thought  
 9 about within the department as a remedy for this  
 10 case. I'm not recommending anything to you today.  
 11 CHAIR SCOTT: People are assuming that we  
 12 will not make this decision today, that there will  
 13 be a round two.  
 14 MR. MENDOZA: I am assuming that based --  
 15 CHAIR SCOTT: Yeah.  
 16 MR. MENDOZA: I mean, Qwest asked to have  
 17 that done. We've asked to have that done. Don't  
 18 get me wrong; this is a very complicated question,  
 19 as you pointed out, Commissioner Koppendraye.  
 20 COMMISSIONER KOPPENDRAYER: Well, I'm  
 21 trying not to get you wrong, because what you just  
 22 said in your opening comments will probably be in  
 23 the paper tomorrow. So we better be very clear that  
 24 that's not what we're doing today or that's not a  
 25 list of what you recommend that be done in --

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1 either?  
 2 MR. MENDOZA: We don't have a number. I  
 3 mean, I think ultimately we think -- I mean, a lot  
 4 depends, I think, on what kind of nonmonetary relief  
 5 this commission comes up with, settles on. That's  
 6 going to affect our opinion about what the monetary  
 7 penalty ought to be.  
 8 CHAIR SCOTT: I tend to agree with that.  
 9 To me the right nonmonetary relief I'd be willing to  
 10 say zero on the monetary personally, but -- I think  
 11 you're right; it is a unique opportunity. That's  
 12 what I meant when one of us has come away with  
 13 our eyes open. Because this is -- This is a  
 14 watershed moment in Minnesota telecom, I believe. I  
 15 think that we either -- the commission either will  
 16 react and put us on a good path or commission -- or  
 17 Qwest will react and the commission will be  
 18 convinced that it will behave differently in the  
 19 future. That part has not happened before. I think  
 20 your defense here proves that that part isn't going  
 21 to happen, and so it's going to land in the  
 22 commission's lap to do something.  
 23  
 24  
 25

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1 MR. TOPP Thank you, Chair Scott. I  
2 appreciate Deputy Commissioner Mendoza's commen  
3 regarding process because these are complex issues  
4 And we're certainly in agreement that if the  
5 commission is going to go down or explore the path  
6 that they've talked about today that there are a lot  
7 of impacts associated with those issues that are  
8 going to need to be taken into account.

9 Secondly, I think we're in agreement that  
10 a creatineremedy that helps competition is the  
11 appropriate path to go. There are statutory  
12 constraints regarding the commission's authority to  
13 do that. But, having said that, doing something  
14 that benefits competition and customers in Minnesota  
15 is the appropriate way to deal with this issue.

16 Just to tick through the issues that  
17 Chair Scott raised and examples of the complexities  
18 that we are dealing with. This notion of  
19 revocation, I think you need to look at what it  
20 would accomplish and what its impact would be. You  
21 know, I think what it would accomplish is you'd get  
22 new players, you'd get new procedures in place. And  
23 I would submit to you that those new players and new  
24 procedures are in place right now and that we have  
25 taken affirmative steps. We have a new CEO that was

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1 agreement that it doesn't make sense for the  
2 commission and the Department of Commerce to sit in  
3 on every negotiation that takes place. Having said  
4 that, to the extent the commission wants to be  
5 comfortable that we are drawing the line in a place  
6 that they feel is appropriate, we're willing to  
7 undertake whatever procedure the commission would  
8 think would be appropriate to ensure that that line  
9 drawing is taking place. We think that it is. We  
10 think that we've announced a standard that we are  
11 following that is fully consistent with the FCC  
12 standard, and we would invite you to take a look to  
13 make a determination for yourself as to whether we  
14 are doing that or not.

15 CHAIR SCOTT: Would you have said in 1998  
16 that you were doing that appropriately?

17 MR. TOPP: Would I?

18 CHAIR SCOTT: Sure. Would Qwest have sat  
19 here at the commission and said in 1998, We are  
20 appropriately making decisions about what to file or  
21 not to file?

22 MR. TOPP: I think that we probably would  
23 have.

24 CHAIR SCOTT: You would have. And you  
25 know what, you weren't. You see what I mean? At

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1 just here last week; and his message was very dear  
2 to Minnesota employees, and that was: Don't tread  
3 in a gray area; we want to -- and if you do I'm  
4 going to fire you. And so we've gotten very clear  
5 direction from our CEO with respect to how to deal  
6 with these issues. We have replaced some of the  
7 people. We've gotten new people involved in the  
8 processes for reviewing this particular issue. And  
9 that's something that we think that the commission  
10 should consider in deciding what it's trying to  
11 accomplish through a remedy.

12 Additionally, there are very significant  
13 impacts, whether you talk about structural  
14 separation, whether you talk about revocation. That  
15 brings into play a whole list of other factors;  
16 network integrity, the impact on employees in the  
17 state, the impact on retirees, the impact on  
18 ratepayers, the impact on the financial condition of  
19 the company, and the consequent impact on the  
20 finance -- financially on the community. And those  
21 need to be taken into account if these are the -- if  
22 this is the type of path that we are looking at  
23 going on.

24 With respect to auditing of negotiations,  
25 I wanted to clarify that that -- I -- we're in

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1 some point the commission has to decide that  
2 enough's enough. Because, yeah, you would have said  
3 that you were. And we didn't know Audrey McKenney  
4 was back there running her little kingdom there. We  
5 didn't know that. We'd have believed you. I  
6 believed you.

7 MR. TOPP: Having the op --

8 CHAIR SCOTT: We were burned

9 MR. TOPP: But what we are pointing out  
10 is that having the opportunity to take an  
11 independent look at the decisions that we make with  
12 respect to these issues gives you the opportunity to  
13 make that call. And --

14 CHAIR SCOTT: And what does that tell me  
15 about the Minnesota market is open: that I have to  
16 look over Qwest's shoulder to see if it's properly  
17 filing what should be filed? How open is our  
18 market?

19 MR. TOPP: Well, I don't think it's  
20 necessary for you to perform that review. However,  
21 if you want to, we can -- we can make that  
22 available. We have put in processes to do that.  
23 There was concern expressed about this being a  
24 unilateral decision on the part of Qwest. And what  
25 we're saying is that we'll welcome the input of all

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1 parties as to where that line should be drawn and  
 2 whether compliance is taking place.  
 3 COMMISSIONER JOHNSON: Mr. Chair.  
 4 CHAIR SCOTT: Yeah.  
 5 COMMISSIONER JOHNSON: Mr. Topp, I have  
 6 mother problem with what you just said. I realize  
 7 the company's in difficult financial straits, but we  
 8 didn't put it there. And you just said for US to  
 9 take into account for the amount of penalties that  
 10 we levy because we might put someone out of work, we  
 11 might close down an office, we might affect  
 12 retirement benefits. I wonder, did you people think  
 13 of all that when you made these secret deals? Now  
 14 we have the problem that you're saying we have to  
 15 take a look and feel guilty about this. You see  
 16 where I'm coming from? It's not right.  
 17 COMMISSIONER REHA: Mr. Chair, I -- I  
 18 think I heard Mr. Topp indicate that if we look at  
 19 structural separation what the impacts of that would  
 20 be as opposed to necessarily the penalty or --  
 21 COMMISSIONER JOHNSON: Oh.  
 22 COMMISSIONER REHA: -- monetary finding.  
 23 COMMISSIONER JOHNSON: Okay.  
 24 COMMISSIONER REHA: But --  
 25 COMMISSIONER JOHNSON: Well, even -- even

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1 but if we're going to look at that, we'd better look  
 2 at that very, very, very carefully in a proceeding  
 3 and so forth.  
 4 But I think what I'm hearing the  
 5 frustration of some of the commissioners and some of  
 6 the other parties is when I first came aboard here  
 7 back in May of 2001, I was not only trying to absorb  
 8 all sorts of stuff, but I was meeting a lot of  
 9 people on both sides. I was meeting company people  
 10 I was meeting department people. I was meeting  
 11 environmental folks. I was meeting a lot of folks.  
 12 And not that long after I was here, one of the  
 13 individuals that I had a chance to meet was -- I  
 14 believe his name was Gordon Martin who had been  
 15 brought on. And I can remember him standing in my  
 16 office on a meet and greet -- we didn't have any  
 17 pending dockets at the time -- telling me that you  
 18 know, this company, we're going to run this company  
 19 as if it were structurally separated, and we're  
 20 going to have -- the wholesale end of it is going to  
 21 be totally separate from the retail end of it; I'm  
 22 not -- I don't even care what's going on on the  
 23 retail, I want to run the wholesale end of it as a  
 24 separate business, and I want to make that work.  
 25 And where is Mr. Martin today? Mr. Martin is out,

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1 so, we didn't cause it.  
 2 COMMISSIONER REHA: No. No.  
 3 CHAIR SCOTT: It would be hard to imagine  
 4 how you can more greatly impact shareholder value  
 5 and retiree benefits than has already happened. Do  
 6 you really think we could adversely impact it? Look  
 7 at the -- Look at the share price for Qwest today.  
 8 You think we could do something that would hurt that  
 9 share price?  
 10 MR. TOPP: If you eliminate our Minnesota  
 11 revenue, yes.  
 12 CHAIR SCOTT: You think so?  
 13 COMMISSIONER REHA: Mr. Chair --  
 14 CHAIR SCOTT: I'm not so sure.  
 15 Commissioner Reha  
 16 COMMISSIONER REHA: -- if I might just  
 17 say a couple of things. I think you're absolutely  
 18 right, Mr. Topp; that if we are going to go down  
 19 that path of at least looking at the issue of  
 20 structural separation that we'd better read very  
 21 cautiously and develop a record that indicates the  
 22 benefits and the risks and pitfalls of going down  
 23 that -- down that route, because I think it's a  
 24 dangerous route, it's an unknown route. And, you  
 25 know, if -- And I'm not saying we can't go there;

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1 because he didn't deliver on that promise I'm  
 2 assuming. And I wonder whether it really was such a  
 3 structural internal separation between the wholesale  
 4 and the retail  
 5 So I think that's some of the frustration  
 6 I think that we as commissioners are feeling. And I  
 7 remember coming here and saying to a lot of people  
 8 that -- because I -- my impression was is that this  
 9 commission was really piling on poor Qwest, and I  
 10 really felt sorry for the company, and I was  
 11 wondering how fair it was. And I remember saying,  
 12 Well, where is the beef; I want to see a complaint  
 13 here, and I want to see the result.  
 14 Wait before I make a judgment about structure  
 15 or about how doing or  
 16 whatever; I -- are there any -- have there been any  
 17 order or decision by this commission that has found  
 18 that Qwest is anticompetitive or is it what we're  
 19 hearing are just people coming and saying things  
 20 aren't fair and competition is stifled and Qwest is  
 21 a bad guy  
 22 And so I really came with an open slate  
 23 to look at that. And since I've been here there  
 24 have been complaints and there have been decisions  
 25 that have come out of this commission. Several.

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1 And -- And after due process hearings in front of an  
2 administrative law judge that doesn't come with the  
3 baggage that some of the commissioners might be here  
4 with and the administrative law judge coming down  
5 with decisions that were very well reasoned and  
6 written and based on testimony and evidence in the  
7 record. So I'm coming -- My other colleagues are  
8 probably saying, She's finally starting to come  
9 down here, seeing the Light. But yet I'm not ready  
10 to go there. I-- I think I do have some belief  
11 that if we sufficiently penalize you and put some  
12 nonmonetary structural -- not structural separation  
13 necessarily, but structural reporting requirements  
14 that maybe there's hope and -- because I think  
15 structural separation might be the -- might be the  
16 final nail in the coffin for the company, and I  
17 don't think it would be to the benefit necessarily  
18 of competition or to the consumers necessarily. I'm  
19 still not convinced of that

20 CHAIR SCOTT: Let's wait till we see the  
21 department's proposal.

22 COMMISSIONER REHA: Well yeah. But --  
23 But those are some of my thoughts. And I agree: I  
24 think we've got to develop a record, and we've got  
25 to look at that option. But I'm not prepared to

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1 tell you right now that I support it or don't  
2 support it.

3 CHAIR SCOTT: Yeah. Well, that's fine.

4 COMMISSIONER JOHNSON: But, Commissioner  
5 I think we have to look at this wholesale and retail  
6 reparation thing.

7 COMMISSIONER REHA: I say we should look  
8 at it.

9 COMMISSIONER JOHNSON: Nothing else has  
10 worked.

11 COMMISSIONER REHA: Well, I think we  
12 should look at it, but we look at it with an open  
13 mind --

14 COMMISSIONER JOHNSON: Oh, definitely.

15 COMMISSIONER REHA: -- we look at it with  
16 all the benefits and potential risks, and we go in  
17 with our eyes wide open and not wide shut.

18 COMMISSIONER JOHNSON: Qwest ought to be  
19 able to help us along.

20 COMMISSIONER REHA: I would hope so. So  
21 those are just my thoughts; that we've got to  
22 proceed cautiously and carefully, and we've got to  
23 look at all the options.

24 COMMISSIONER JOHNSON: But, you know, I  
25 don't see them losing my revenue that way. I think

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1 it would make them a stronger company.

2 COMMISSIONER REHA: Maybe.

3 COMMISSIONER JOHNSON: They'd be fighting  
4 separately amongst one another for new business, and  
5 that should open up the competition phase  
6 completely.

7 COMMISSIONER REHA: Well, I-- Another  
8 industry that we look at and regulate, the electric  
9 industry, is going through a similar -- sort of a  
10 structural separation with the -- what the -- what  
11 they're doing with respect to independent trans --  
12 regional transmission organizations and everything  
13 else. And we're finding here, after the federal  
14 government comes out with their notice of public  
15 rule making, that it ain't so easy. It's a lot more  
16 difficult than we think.

17 And so all I'm saying is that we should  
18 go in with our eyes wide open and we should develop  
19 the pluses and the minuses of such a remedy. That's  
20 all.

21 COMMISSIONER KOPPENDRAYER: See what I  
22 mean, Mr. Alpert, about the government being the  
23 biggest one in the room? It could end up being the  
24 biggest culprit in the room. If you -- you and your  
25 department are aware of what Commissioner Reha just

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1 talked about. The government thought it had a good  
2 idea in California in the electrical industry when  
3 the mess happened. And guess who proposed taking  
4 the whole thing over? It was the governor himself  
5 wanted to actually take it over in restructuring  
6 electricity. And the companies that existed as  
7 vertically-integrated companies we end up discussing  
8 systems that encompass bureaucracies, if you may,  
9 that encompass half of the geographic territory of  
10 the United States and the government sanctioning  
11 those instead of what existed.

12 And so what we could effect here is what  
13 concerns me if we don't consider every step along  
14 the way what the consequences of our actions might  
15 be. There's -- For the most part -- it hasn't been  
16 said here today, but there's probably several  
17 million customers out there. I don't know, how many  
18 lines does Qwest have now?

19 MR. TOPP: Just over two million

20 COMMISSIONER KOPPENDRAYER: There's  
21 probably -- of those just over two million, there's  
22 probably two million customers who are very happy  
23 with their service and their price. And to your  
24 credit a lot of that has to do with the fact that  
25 it's a -- it was a monopoly and good oversight by

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1 your part. But we have to be really careful when we  
2 start saying let's tear this all down and do  
3 something different.  
4 MR. NPET: Chair Scott, Commissioner  
5 Koppendrayar, I think that what Deputy Commissione  
6 Mendoza said earlier, to clarify his comments in  
7 response to yours, we're not-- we're not saying we  
8 should do this today. It's something that needs to  
9 be looked at; it needs to be discussed. The  
10 ramifications should be looked at pro and con, and  
11 then take a look at what other options do you have  
12 and what's the impact on those options? We tried it  
13 without doing this. It's not working. You need to  
14 at least address that as part of an overall plan.  
15 You may come to the realization or the decision it's  
16 not what you want to do, that it doesn't make sense.  
17 But we're talking about it, and that's more than we  
18 were doing yesterday.  
19 CHAIR SCOTT: I would think that a  
20 structural separation plan that you would propose  
21 would also result in Qwest having 271, because I  
22 would think at that point there would be no reason  
23 not to say they've met the checklist, would there?  
24 MR. MENDOZA: Mr. Chair, Commission --  
25 or. Mr. Chair, I think that's right. I mean, I --

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1 CHAIR SCOTT: Yeah. So really ilk--  
2 MR. MENDOZA: I don't know what else --  
3 If that doesn't work --  
4 CHAIR SCOTT: Yeah.  
5 MR. MENDOZA: -- maybe we should just go  
6 back to 1984.  
7 COMMISSIONER JOHNSON: Nothing wrong wit  
8 that.  
9 COMMISSIONER KOPPENDRAYER: Having sai  
10 that when -- when I talked about that awhile ago,  
11 I'm usually arguing with you, and I was  
12 complimenting you on your work and also Ms. Patel.  
13 And I've often misused your name by using  
14 your tint name. And when something's done in  
15 public, usually there's a little thing in the paper  
16 apologizing for it, so I thought I would apologize  
17 publicly as well.  
18 MS. PATEL: Thank you, Commissioner. Not  
19 a problem  
20 COMMISSIONER KOPPENDRAYER: It's  
21 probably -- I have to make an excuse wo. It's  
22 probably due to age. I worked in a previous job  
23 with somebody whose name was -- one of my  
24 colleague's name was Birdie and the other was Purdy,  
25 and so we had a lot of fun with that. And it seems

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1 like I want to call you Priti instead of Ms. Patd.  
2 I'm sorry.  
3 CHAIR SCOTT: I think, Mr. Topp, we  
4 actually interrupted you --  
5 COMMISSIONER REHA: We did.  
6 CHAIR SCOTT: -- about 30 minutes ago.  
7 COMMISSIONER KOPPENDRAYER: I gave you  
8 time to think though.  
9 MR. TOPP: Yeah. Well, I appreciate  
10 that. And, I mean, I think one of the primary  
11 messages I wanted to get across is the complexity of  
12 the types of issues that we're raising. And you  
13 know, this discussion I think amply identifies that.  
14 There are certainly legal issues as well, including,  
15 you know, whether this commission has authority  
16 pursuant to state statute and the consistency or  
17 inconsistency of structural separation with the  
18 federal telecom act.  
19 CHAIR SCOTT: Is the message coming in at  
20 all? You see that's the frustration I have is I  
21 just have this sense that Qwest just doesn't get it.  
22 MR. TOPP: Well --  
23 CHAIR SCOTT: Do you hear the  
24 frustration? Do you hear the point of view here  
25 today? I mean, I just have this sense that you --

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1 you just are not -- nothing sinks in.  
2 MR. TOPP: We absolutely hear the  
3 message.  
4 CHAIR SCOTT: We have the authority to  
5 pull your certificate of authority. I mean, that's  
6 why that's what I'd prefer to do, because there  
7 would be no legal question about that. That's clear  
8 in the statute.  
9 COMMISSIONER KOPPENDRAYER: But  
10 Commissioner Scott, they could hear you but not  
11 necessarily agree with your remedy.  
12 CHAIR SCOTT: I don't care if they agree  
13 with my remedy or not.  
14 COMMISSIONER KOPPENDRAYER: You're asking  
15 them --  
16 CHAIR SCOTT: What we're --  
17 COMMISSIONER KOPPENDRAYER: -- to agree.  
18 CHAIR SCOTT: No, I'm asking them to at  
19 least accept that Qwest is engaged in a pattern of  
20 conduct that could easily lead this commission to  
21 conclude that you simply aren't up for the  
22 responsibilities that the telecom act gives you. I  
23 hear absolutely no sense that that's the case.  
24 None.  
25 MR. TOPP: Well, there is -- Clearly we

1 have heard the message from this commission that  
2 there are concerns about our behavior, and we are  
3 taking steps to address those. And I think that  
4 we've been quite forceful in doing that, and we'll  
5 continue to do so. And we are very open to a  
6 dialogue as to creative ways to ensure on a  
7 going-forward basis that this commission is  
8 comfortable.

9 There are issues, you know, legal issues  
10 and other issues and policy issues with which we  
11 will likely disagree. But having said that, we have  
12 been very willing to try and look at these issues on  
13 a going-forward basis.

14 COMMISSIONER REHA: If I might just say,  
15 I think everybody here has the right to pursue their  
16 legal rights, whether it be before this commission  
17 or the courts. But I guess what -- you know, I  
18 think what you're hearing is frustration because it  
19 seems as if we're back here talking about this, you  
20 know, on more than one occasion. But, you know, I  
21 think I certainly see that you have the right to  
22 pursue your legal rights. And if you don't agree  
23 with us or the chair or whatever, that's your  
24 prerogative.

25 MR. TOPP: Well, and our view is if we're

1 further proceedings to address that issue.

2 COMMISSIONER REHA: And then there's  
3 mother issue; and that is that we do have the  
4 option, as long as it's not a doubling of the pen --  
5 monetary penalties, but that the matter can also be  
6 referred to the attorney general for a penalty  
7 proceeding and also looking at other violations of  
8 statutes and rules such as annuity matters and so  
9 forth.

10 Are you proposing that -- Is anybody here  
11 proposing that that also be looked at in this  
12 separate proceeding? I just want to make clear  
13 what -- if we do go to a separate proceeding on a  
14 penalty phase, what is encompassed in that

15 COMMISSIONER JOHNSON: That's a good  
16 point.

17 MR. ALPERT: Chair Scott, Commissioner  
18 Reha, the department would suggest that looking at  
19 remedies under 237 461 is certainly another area to  
20 be looked at, as pointed out by staff briefing  
21 papers and we just real briefly alluded to in our  
22 comments.

23 I'll let Mr. Marker address some of those  
24 other matters.

25 COMMISSIONER REHA: Okay. So

1 going to go through this penalty proceeding that  
2 it -- we need to work towards an end that is useful  
3 for competition, that's useful for customers in the  
4 state of Minnesota, and that that should be the  
5 focus of this commission. And we're willing to  
6 engage in that dialogue.

7 CHAIR SCOTT: What are your thoughts on  
8 the specifics, Mr. Topp?

9 MR. TOPP: With respect to the specifics  
10 that we would put forward, that's why I would like  
11 to have a proceeding. I don't want to sit here and  
12 son of throw out ideas. I think that that's  
13 something that would need to be addressed as a part  
14 of a proceeding.

15 COMMISSIONER REHA: Is it your  
16 contemplation, Mr. Topp, that in that separate  
17 proceeding that we'd never -- we'd not only look at  
18 nonmonetary options such as the department has put  
19 forward but also looking at the monetary penalties?

20 MR. TOPP: Yeah And I think that that  
21 would be critical, that that needs to be addressed  
22 as a part of a separate proceeding. The ALJ has  
23 indicated that further factual development is  
24 necessary with respect to those issues. And so,  
25 yes, it would be my contemplation that we need

1 everything -- Basically just about anything is fair  
2 game in a separate proceeding is what I'm hearing.

3 MR. ALPERT: Chair Scott, Commissioner  
4 Reha, as far as penalties are concerned, potential  
5 monetary and nonmonetary penalties, yes. I mean,  
6 not -- not -- The department, as we've indicated,  
7 we're real concerned that we don't turn this into a  
8 proceeding to rehash --

9 COMMISSIONER REHA: Right

10 MR. ALPERT: -- what's already been  
11 litigated. It would just be supplementing on those  
12 areas.

13 COMMISSIONER REHA: Right. But just  
14 another question. I think one of the considerations  
15 that the commission looks at in terms of assessing  
16 penalties are issues related to mitigation. And so  
17 that wouldn't necessarily be relitigating, but I  
18 think it's what the company has indicated they want  
19 is sort of a forward-looking view of their efforts  
20 to try to address some of these problems.

21 MR. ALPERT: Chair Scott, Commissioner  
22 Reha, we would like to stick to the record as close  
23 as we can. They've supplemented it today obviously  
24 by indicating some things that they claim to be  
25 doing that was not part of this record. Mitigation

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1 is an issue. I -- You know, but --

2 COMMISSIONER REHA: That's what --

3 CHAIR SCOTT: In adopting the ALJ's  
4 report, we've already found paragraph 380: Qwest  
5 has not taken meaningful corrective action to remedy  
6 the harm caused by failing to file the specific --

7 COMMISSIONER REHA: Right.

8 CHAIR SCOTT: -- agreement cited in a  
9 complaint. So.

10 COMMISSIONER REHA: And I'm looking at  
11 forward-looking mitigation efforts, which the  
12 company seems to be indicating here today should be  
13 considered. And I guess I want a clarification -- I  
14 realize that what the ALJ did is, looking backwards,  
15 mitigation didn't amount to a hill of beans. But  
16 perhaps going forward it might.

17 MR. ALPERT: Chair Scott, Commissioner  
18 Reha, that's partially -- I agree with part of that.  
19 The agreements were entered into in the past. We  
20 filed our complaint in February, on February 14.  
21 They conditionally filed some of the agreements on  
22 March 1st. They terminated a number of agreements.  
23 And the ALJ came out with his findings on  
24 September 20th. So there was some forward-looking  
25 aspects to what Judge Klein --

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1 MR. O'GRADY: Chair Scott, I believe with  
2 the monetary you would want to get a good sense of  
3 the day count. I'd turned on some numbers in the  
4 briefing paper, but that's all they are. And I  
5 think it would be useful count by count to have the  
6 parties address what the appropriate day count is so  
7 that --

8 CHAIR SCOTT: Okay.

9 MR. O'GRADY: -- if you are going to  
10 assess penalties under 462 that you feel comfortable  
11 in the basis and the number of days that are used as  
12 a basis.

13 COMMISSIONER JOHNSON: Mr. Chair.  
14 Mr. Alpert, how much time do we need to do this?

15 MR. ALPERT: Chair Scott, Commissioner  
16 Johnson, both Qwest and the department in their  
17 exceptions and their reply to the exceptions had  
18 indicated that this should be or could be wrapped up  
19 by November.

20 CHAIR SCOTT: You're only a week  
21 different in your schedules, as I recall.

22 MR. ALPERT: Yeah. There -- I think the  
23 only difference between our schedule in terms of  
24 time was we didn't put in there when the commission  
25 had to make its -- when it was contemplated the

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1 COMMISSIONER REHA: Okay.

2 MR. ALPERT -- reviewed and found I  
3 believe that -- that if there was some evidence from  
4 Qwest that, you know, we've changed thing on a  
5 going-forward basis. here's what you should take  
6 into consideration, they had an opportunity to  
7 present it. Mr. Brotherson presented this evidence  
8 about this new procedure that they have, and there  
9 was some testimony on that. They were not precluded  
10 from presenting additional testimony. They now want  
11 to come in and say, Now that you've made these  
12 findings, now that we're going forward with  
13 penalties, we want to present -- apparently we want  
14 to present additional evidence now and what more  
15 we're willing to do to try to mitigate what we've  
16 done. I'm not sure where that's going, but --

17 CHAIR SCOTT: Do we need additional  
18 evidence on monetary? Maybe we just need it on  
19 nonmonetary. I mean, the A U was specifically asked  
20 to make recommendations as to whether disciplinary  
21 action or penalties were appropriate, and he went  
22 through the factors and did all that. So why do we  
23 need to go back through monetary? Maybe we just  
24 need to go back through nonmonetary.

25 Mr. O'Grady.

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1 commission would make its final decision, just when  
2 the commission would hear it. So.

3 COMMISSIONER JOHNSON: Well, now we've  
4 enlarged this a little bit.

5 MR. ALPERT: You have enlarged this a  
6 little bit. And depending upon where you go with  
7 how you want this hearing structured, it might  
8 require a little bit further. The issue about how  
9 many days. I'm not sure that there needs to be more  
10 evidence on that as opposed to legal arguments and  
11 possibly discussion between the parties as to  
12 whether there's any -- anything that we can agree on  
13 on a going-forward basis. But I'm not sure what  
14 additional evidence about that is going to -- is  
15 going to provide.

16 CHAIR SCOTT: Mr. Topp.

17 MR. TOPP: Yeah. With respect to  
18 monetary penalties, there are a number of factors  
19 which we are entitled to present under the statute  
20 how those factors should impact. And one of those  
21 is corrective actions that we have taken. One is,  
22 you know, other public interest issues, and that  
23 sort of thing.

24 When this commission referred the issue  
25 to the ALJ, they issued -- referred the issue of,



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number 1, has there been a violation; number 2, whether penalties are appropriate. You did not refer to the ALJ the question of the amount of penalties. And it's our dew that we're entitled to present evidence with respect to those factors and that the commission should take those into account in determining the amount of monetary penalty. Therefore, we think further proceedings are warranted.

CHAIR SCOTT: Could you give me an approximate example of whar that would be? What's nor in the record?

MR. TOPP: With respect to monetary penalties, I think that we would go through in detail the corrective actions that we have taken to address the concerns *chat* have been raised as a part of this proceeding. And many of those actions have been taken since the time of the hearing in this matter. We would -- You know, the record on everything in this case other than the McLeod deal was closed in April; and, you know, much of the -- for instance, the letters that have gone on to the commission and the filing procedures, we have, you know, announced and really put in place since that time. And so we think that it's appropriate for the

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just reading directly from the stature; and it specifically says: Or planned by the person committing the violation. So.

CHAIR SCOTT: Sure. And they could have told the ALJ what ~~hey~~ were planning to do. And apparently *they* did and it was nothing. He characterized it as nor meaningful. Now we're going to apen it up *again*. And then when do we end it?

COMMISSIONER REHA: Well, we didn't --

CHAR SCOTT: See, I thought we -- I thought this time we got smart. Remember that last --

COMMISSIONER REHA: Yep.

CHAIR SCOTT: -- docket we had where we felt like we didn't have enough? This time we thought we were smart, and we specifically asked the ALJ to make findings on the 462 factors *sa* we would not be in a position where we had to go back and ask people to comment on them *again*. Now it feels like we're just going back and relitigating that when I thought that that was all in here.

COMMISSIONER REHA: I see what you're saying, Mr. Chair; but I would be a little nervous not to give them the opportunity to indicate that.

MR. ALPERT: Chair Scott.

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commission to consider that in determining the amount of penalty.

COMMISSIONER REHA: Yeah. And I would indicate that in subdivision 2 of 237.462, item 6, it does provide, with respect to assessing a penalty, any corrective action taken or planned by the person committing the violation. So I would think that they should be able to provide that information.

CHAIR SCOTT: Well, they did because paragraph 380 talks about meaningful corrective action. That's what I'm just trying to be clear in my own head about why we're going back through this when it seemingly was in front of the ALJ. It's a category of issuer the AW already covered. So then the answer is, Well, we've done a bunch of things since the hearing. Okay. I'm just -- I just was trying to be clear in my head how that cuts. Were was do -- The corrective action that the ALJ heard at the hearing he characterizes as not meaningful. And so now we're going to apen the record to allow the company to put in additional things they've done since the hearing, and it just isn't clear to me procedurally why we would do that.

COMMISSIONER REHA: Well, Mr. Chair, I'm

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CHAIR SCOTT: Yeah.

MR. ALPERT: Given the direction that the ALJ went with his recommendation with the nonmonetary sanctions and some creative ideas and some of the things we've talked about today, we're going to be looking at creative ideas on how to correct Qwest's behavior. They apparently think they've done some of this, so they want some input into showing you that they've done some things; therefore, other things are nor necessary. The department doesn't object to some limitations. I mean, if they want to present some limited information about what they finally will do, you know, as opposed to just argument, because we all question how far the arguments are without some proof that they're actually going to do something. But, I mean, we went to be -- We don't want this -- Obviously the department is concerned that this drags on well into 2003, but we don't want -- I guess we do want to hear from Qwtw what it is they do plan an doing. And --

COMMISSIONER KOPPENDRAYER: And the way I look at it in being creative in solutions doesn't mean if in the last month you've changed people with new -- new direction and new instructions on how to

1 function that the creative idea that we come up with  
2 is to change those same people again a month later.  
3 That doesn't make sense. So we have a look at  
4 what's been done since the time of the information  
5 that's in the record.

6 CHAIR SCOTT: So how should our order  
7 from this proceeding with respect to remedies and  
8 penalties, how should it read? Give me some help on  
9 that. I've been trying to figure out how the order  
10 is going to keep it so that, you know, there's a  
11 defined scope for everybody but yet it covers the  
12 waterfront of what people want to do.

13 MR. MENDOZA: Mr. Chair, I guess I'll  
14 take a shot at that. I mean, obviously our main  
15 concern is that we don't end up relitigating the  
16 issues that have already been litigated and decided.  
17 Perhaps something to the effect that Qwest would  
18 make -- would come up with some proposals for what  
19 they believe will remedy or are sufficient penalty  
20 or remedy, whatever their position may be, for the  
21 conduct that's occurred here, taking into account,  
22 you know, the clear message that I think has been  
23 delivered by this commission today. And, you know,  
24 that would be limited by a prospective explanation  
25 of what they intend to do in a relation back to the

1 briefs November 8th, reply November 15th, the  
2 hearing on the 19th.

3 COMMISSIONER REHA: I like that.  
4 CHAIR SCOTT: Does hearing the 19th work,  
5 Mr. Oberlander?

6 MR. OBERLANDER: Mr. Chair, I haven't  
7 checked the commission calendar for that date. But  
8 I'm not aware of any conflicts at this point.

9 CHAIR SCOTT: 8th is opening briefs and  
10 supporting affidavits. 15th of November is reply  
11 briefs with supporting affidavits. The 19th is the  
12 commission hearing. It means quick turnaround by  
13 staff, but I would guess we'll be reading this stuff  
14 direct anyway. Is the 19th a Thursday? Does  
15 anybody know?

16 COMMISSIONER KOPPENDRAYER: It's Tuesday.

17 CHAIR SCOTT: Tuesday.

18 COMMISSIONER REHA: Ms. Lehr had a  
19 question, Chair Scott.

20 CHAIR SCOTT: Yeah.

21 MS. LEHR: If -- Chair Scott, if Qwest  
22 was going to put together some sort of proposal  
23 regarding this future plan and past remedy plan,  
24 would it be appropriate for them to also propose how  
25 they intend to remedy the specific CLEC harm?

1 conduct and why -- and why that specific remedy or  
2 penalty is an adequate fix for the violations that  
3 occurred. The department would live under the same  
4 rules.

5 So, I mean, I think it can be limited in  
6 that way in terms of, you know, connecting the  
7 remedy with the violation. And I don't know if you  
8 can get any more specific than that other than to,  
9 you know, make sure that the commission sort of  
10 monitors and keeps everybody in line.

11 COMMISSIONER REHA: In other words, the  
12 findings are the findings; and we're not going to  
13 modify anything there. And the conclusions of law  
14 are the conclusions of law; we're not going to  
15 modify anything there. We're looking forward as to  
16 what the penalties should be based on those findings  
17 and conclusions. And I think we can state that  
18 clearly in whatever order comes out, that we're not  
19 relitigating the facts or the conclusions.

20 COMMISSIONER JOHNSON: And, you know,  
21 this shouldn't take much time. This is a hot  
22 topic. Everything is keyed up.

23 CHAIR SCOTT: I was -- On that subject I  
24 was thinking of adopting the Qwest schedule.  
25 Deleting the penalty order issue date; but opening

1 CHAIR SCOTT: I would assume that people  
2 will tell us whatever remedies, monetary and  
3 nonmonetary, that they think are appropriate. I  
4 guess I'm not going to tell anybody what they should  
5 address or not address. That's up to them.

6 COMMISSIONER KOPPENDRAYER: Well,  
7 Ms. Lehr, the CLECs are included in the -- in the  
8 round of comments. So --

9 CHAIR SCOTT: So you'll have your own  
10 thoughts.

11 COMMISSIONER KOPPENDRAYER: -- you put  
12 your own --

13 CHAIR SCOTT: Yeah.

14 MS. LEHR: I thought that Qwest was going  
15 to put together a proposal. But if we're all going  
16 to simultaneously comment.

17 COMMISSIONER KOPPENDRAYER: You're going  
18 to do it simultaneously if we adopt the Qwest  
19 procedure, which -- which I think is a fair way to  
20 do it. Because if we went with the department's  
21 procedure, that's -- in the spirit of a level  
22 playing floor here, that's not a level playing  
23 floor. Because that's asking Qwest to put its offer  
24 forward; and then we look at what's their best  
25 offer, and everybody one ups it before they comment

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1 MR. ALPERT: Chair Scott, Commissioner  
2 Koppendray, that wasn't our intent. Our intent  
3 was if Qwest wanted to address it, it was our  
4 ultimate burden -- or the commission's ultimate  
5 burden to address it. And sometimes you go  
6 beyond-- Not knowing what the extent of the hearing  
7 was going to be, we sometimes expand things rather  
8 than just react to what's been presented. But we're  
9 comfortable with the schedule as recommended.

10 COMMISSIONER KOPPENDRAYER: Thank you  
11 COMMISSIONER JOHNSON Do you want to  
12 make that a motion?

13 CHAIR SCOTT: You know. I never really  
14 did ask if any other party wants to address the  
15 commission on remedies and penalties. MCI? AT&T?  
16 RUD?

17 Mr. Witt.

18 MR. WITT: Mr. Chairman, numbers of the  
19 commission, AT&T is on record as advocating  
20 structural separation for Qwest in view of the  
21 number of previous -- well, past violations that  
22 have occurred and the anticompetitive conduct that  
23 has occurred. We do share Commissioner Reha's  
24 concern that going down that path is something that  
25 should be done cautiously and with due deliberation.

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1 have mi advocated for revocation of certificate of  
2 authority, and we do not do that here today. Like  
3 it or not, it seems like when a company like Qwest  
4 has problems or a company like Xcel has problems  
5 they become everybody's problem to a certain degree.  
6 And that's certainly something that the attorney  
7 general is aware of. This is serious conduct. At  
8 the same time we're very concerned about jobs in  
9 Minnesota, given the current situation -- economic  
10 situation. Whether problems are self-imposed,  
11 imposed by outside sources, or some combination of  
12 the two, this does become everybody's problem. I  
13 think the discussion here today is reflective of  
14 that, and we're willing to partake in that  
15 discussion further.

16 CHAIR SCOTT: All right. Just before I  
17 forget, Mr. Mendoza mentioned making the record  
18 available public. Why don't you guys address that  
19 in your remedies briefs as well?

20 All right. Anything else we need to do,  
21 Ms. Hammel?

22 MS. HAMMEL: Just one thing, Mr. Chair,  
23 that you might consider how you're going to treat  
24 approval of the interconnection agreements that have  
25 not been terminated. Do you want to begin a process

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1 And with that in mind, I think that we  
2 would definitely be interested in participating  
3 fully in the penalty phase of this and putting our  
4 two cents worth in at the appropriate time. So  
5 thank you very much.

6 CHAIR SCOTT: Anyone else?

7 COMMISSIONER KOPPENDRAYER: But,  
8 Mr. Witt, make the suggestion of the ALJ to heart  
9 and don't put all your eggs in one basket.

10 MR. WITT: Oh, no question, Mr. Chairman,  
11 Commissioner Koppendray.

12 COMMISSIONER KOPPENDRAYER: Because I  
13 want some creative ideas. I don't want an or a  
14 idea.

15 MR. WITT: Oh, Mr. Chairman. Commissioner  
16 Koppendray, I -- I agree with you wholeheartedly,  
17 and we will try to make our -- our comments as  
18 thorough and as creative as we can, certainly.  
19 Thank you.

20 CHAIR SCOTT: Mr. Marker?

21 MR. MARKER: Thank you, Mr. Chair,  
22 Commissioners. The RUD is comfortable with the  
23 recommendation as discussed by the commission. We  
24 supported exploring the structural remedies in the  
25 past and would support that effort here as well. We

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1 effective today to start 90 days running or what  
2 would you like to do there?

3 CHAIR SCOTT: I'd like the parties to  
4 tell us what they think we should do with them in  
5 their follow-up briefing on remedies. Is that a  
6 cop-out or is that productive?

7 COMMISSIONER JOHNSON: No, that's fine.

8 CHAIR SCOTT: Is that all right? Because  
9 you're right, we do need to deal with that. I'm  
10 assuming that those agreements will play some role  
11 in the nonmonetary remedy phase. It would seem like  
12 the natural that they would, but I don't know.

13 Anything else we need to do today? We'll  
14 be back on the 19th, right --

15 COMMISSIONER JOHNSON: Right.

16 CHAIR SCOTT: -- under this schedule?

17 COMMISSIONER JOHNSON: We need a motion  
18 to all this.

19 CHAIR SCOTT: Yeah, I guess we do.

20 COMMISSIONER KOPPENDRAYER: Well,  
21 Mr. Chair, then I guess on page 12 we would be  
22 adopting as a procedure in the center of the page  
23 Qwest's suggested procedure with the amendment that  
24 would -- or with the deletion of the date of the  
25 25th.

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1 CHAIR SCOTT: Yes. All right. Thank  
2 you, Commissioner Koppendrayer.

3 We've had a lot of discussion, Peter,  
4 about the rope of this follow-up briefing. Do we  
5 need to regurgitate that now?

6 MR. BROWN: No.

7 CHAIR SCOTT: No? All right. Any  
8 discussion of the pending motion? Hearing none, all  
9 those in favor signify by saying aye.

10 ALL COMMISSIONERS: Aye.

11 CHAIR SCOTT: Those opposed? Motion  
12 carries 4/0.

13 Final thought for the day, as people go  
14 away and talk about that crazy Minnesota commission.  
15 If you really think about it, what distinguishes one  
16 state from another really isn't the commission as  
17 much as its consumer advocates, because commission  
18 can only do what records in front of them allow them  
19 to do. And I think in this case if you gave this  
20 record to any given commission in the Qwest 14-state  
21 region, I'm not sure the result would be much  
22 different at all. What's different is that they  
23 don't have this record in front of them. And I  
24 think you have to take the hats off to our folks at  
25 the table who put this case together. It was very,

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1 very well done.

2 Thank you. That's it. Bye.  
3 proceedings concluded at 2:25 p.m.)  
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1 STATE OF MINNESOTA)

) ss.

2 COUNTY OF SCOTT )  
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4

5 REPORTER'S CERTIFICATE  
6  
7

8 I, Angie D. Threlkeld, do hereby  
9 certify that the above and foregoing transcript,  
10 consisting of the preceding 167 pages is a  
11 correct transcript of my stenographic notes, and is  
12 a full, true and complete transcript of the  
13 proceedings to the best of my ability.  
14 Dated October 24, 2002.

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